SUPREME COURT OF QUEENSLAND

CITATION:	*Knapp v Hinchliffe* [2004] QSC 326
PARTIES:	**GERALDINE MARY KNAPP** (plaintiff/respondent) v **DAVID HINCHLIFFE** (defendant/applicant)
FILE NO/S:	S8342 of 1999
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2004
JUDGE:	McMurdo J
ORDER:	**1. Paragraphs 4(b)(ii), 5(b), 5(c), 7(b)(ii)A, 7(b)(ii)E, 7(b)(ii)F, 7(b)(ii)I, 9(b) of the Reply will be struck out.** **2. The plaintiff will be ordered to provide particulars of paragraphs 7(b)(ii) and 9(c)(v) by specifying the parties from whom the defendant should have inquired as to the accuracy of the publication, by identifying those persons by name or description.** **3. The application filed on 10 June 2004 is otherwise dismissed.**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – where Reply pleads that plaintiff is aware that the defendant's costs of proceedings are protected by insurance policy – whether defendant's insurance is relevant – whether pleading should be struck out DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where defendant pleads qualified privilege – where Reply pleads that publication was not for the public good – whether for "public good" if no steps taken to verify truth of publication – whether pleading only goes to issue of good faith – whether pleading should be struck out DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where Reply pleads the

reason by why the defendant intended to make a statement on a subject – whether distinction between purposes and motive in s 16(1) of *Defamation Act* 1889 – whether pleading only goes to issue of good faith – whether pleading should be struck out

DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where Defence pleads extended category of qualified protection under the common law based on *Lange v Australian Broadcasting Corporation* – where Reply pleads that defendant is not entitled to rely upon any extended defence of qualified protection – where particulars allege publication was unreasonable, excessive or motivated by ill will – where defendant argues that particulars provided by plaintiff are not capable of proving unreasonable publication – whether each particular is relevant – whether any of the particulars should be struck out

DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where Reply alleges defendant failed to take proper steps to verify the accuracy of the publication – whether particulars of steps which should have been taken including the identification or categorisation of those parties is necessary

Criminal Code (Qld), s 377
Defamation Act 1889 (Qld), s 16(1), s 16(1)(c), s 16(1)(e), s 16(1)(h),
Uniform Civil Procedure Rules, r 150(2)

Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419, applied
Bellino v Australian Broadcasting Corporation (1996) 185 CLR 183, considered
Bridges v Australian Consolidated Press Ltd [1967] 2 NSWR 511, considered
Calwell v IPEC Australia Ltd (1975) 135 CLR 321, cited
Cashman v Hinchcliffe [2003] QCA 161, cited
Cotogno v Lamb (No 3) (1986) 5 NSWLR 559, cited
Fitzpatrick v Walter E Cooper Pty Ltd (1935) 54 CLR 200, cited
Justin v Associated Newspapers Ltd [1967] 1 NSWR 61, considered
King v Wilkinson (1957) 74 WN (NSW) 222, cited
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, considered
Magub v Hinchliffe [2004] QSC 004, cited
Musgrave v The Commonwealth (1937) 57 CLR 514, cited
Pervan v North Queensland Newspaper Co Ltd (1993) 178 CLR 309, cited
Rajski v Carson (1986) 4 NSWLR 735, cited
Rajski v Carson (1988) 15 NSWLR 84, distinguished
Roberts v Bass (2002) 212 CLR 1, considered

Telegraph Newspaper Co Ltd v Bedford (1934) 50 CLR 632, cited
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448, cited

COUNSEL: M P Amerena for the applicant
P J Favell with R J Anderson for the respondent

SOLICITORS: King & Company for the applicant
F.G. Forde, Knapp & Marshall for the respondent

[1] **McMURDO J**: This is one of several cases brought by persons who were councillors within the Liberal Opposition in the Brisbane City Council, against Councillor Hinchliffe for statements made by him at a meeting of the Council on 24 August 1999. Each councillor has brought his or her own proceedings but relies upon the same publication and the pleadings are relevantly identical. In another of these cases, *Cashman v Hinchliffe*,[1] the Court of Appeal made orders striking out parts of the Statement of Claim. Another is *Magub v Hinchliffe*,[2] in which I made orders to strike out parts of the then Statement of Claim and for particulars of it. The cases have been managed as a group, and the parties have agreed that this case should be tried in advance of the others. It will be tried by jury. This is an application by the defendant which attacks certain parts of the Reply and its particulars.

The defendant's insurance

[2] Paragraph 17 of the Defence pleads that certain matters should be taken into account in mitigation of any damages or in respect of any exemplary damages. One of those matters is as follows:

> "(d) The plaintiff with fellow Liberal Party Councillors have each resolved herein to bring separate proceedings in respect of the same incident for the purpose of heightening the publicity referred to in sub-paragraph (c) hereof and also to oppressively increase the defendant's legal costs and the defendant's exposure to legal costs;
>
> …"

[3] As I read it, this paragraph alleges that the various Councillors agreed with one another that each should bring his or her own proceeding for certain purposes which they had in common. It refers to something which occurred necessarily prior to the bringing of proceedings. It does not refer to conduct which is subsequent to the bringing of those proceedings. For example, it does not allege that the various plaintiffs have acted together to cause these cases to continue to be prosecuted so distinctly from one another as to cause the maximum inconvenience and expense to the defendant. As I have mentioned, the various plaintiffs and the defendant have

[1] [2003] QCA 161 where the full text of the publication complained of is annexed to the Court's judgment
[2] [2004] QSC 004

agreed that this case brought by Councillor Knapp should be tried in advance of the others.

[4] Paragraph 4(b) of the Reply denies this paragraph 17(d) of the Defence. One of the pleaded bases for that denial is in paragraph 4(b)(ii) which is in these terms:

> "(ii) The plaintiff is of the understanding the defendant's costs of these proceedings are protected by an insurance policy and thereby could not hold as a motivation, a desire to increase the defendant's costs;"

[5] It will be seen that the plaintiff's understanding as to the defendant's insurance is pleaded in the present tense. There is no allegation that the plaintiff knew or understood that the defendant was insured when she commenced these proceedings in 1999. This is because, as the plaintiff concedes, she was not aware of the defendant's insurance until June 2002. Any insurance of the defendant is not said to have been relevant to the plaintiff's state of mind when she brought these proceedings. Therefore it is irrelevant as a basis for a denial of the allegation that she had some purpose in bringing the proceedings, and there is a particular mischief in it because the defendant's insurance ought not to be disclosed to the jury if it is irrelevant to any issue: *Fitzpatrick v Walter E Cooper Pty Ltd* (1935) 54 CLR 200 at 210-211, 212, 216-217 and 222-223; *King v Wilkinson* (1957) 74 WN (NSW) 222 at 224-225.

[6] The defendant's insurance is said to be relevant in two ways. First, the plaintiff submits that it negates any suggestion that at least since the plaintiff became aware of the insurance in June 2002, she has prosecuted these proceedings in some way distinctly from the other cases so as to bring the maximum financial pressure to bear upon the defendant. But the problem with that submission is that there is no such suggestion. As I have said, paragraph 17(d) pleads what the various plaintiffs decided to do before they brought their respective proceedings. Mr Amerena, who appeared for the defendant, said that any doubt about this could be cured by an amendment to paragraph 17(d) to substitute the word "institute" for "bring". In my view that would not alter the effect of the plea. But in case others take a different view, it is as well that it be amended as Mr Amerena proposes.

[7] Secondly, the plaintiff says that the defendant's insurance is relevant to his means, and his means are relevant to a consideration of exemplary damages, for which the plaintiff cites *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 461 and *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 585. They are certainly authorities for the proposition that the financial circumstances or means of a defendant are relevant, but they do not support the proposition that so too is the defendant's insurance. Indeed in the latter case, McHugh JA (as he then was) expressly dismissed the relevance of the defendant's insurance to a claim for exemplary damages. In that case, the unsuccessful submission was that exemplary damages should not be awarded where the defendant was insured because the defendant personally would not feel the "smart". Interestingly, the plaintiff puts forward the defendant's insurance as a factor in favour of an award of exemplary damages. In neither way is it relevant in my view.

[8] The pleading in paragraph 4(b)(ii) of the Reply is irrelevant and would prejudice the fair trial of this case. It will be struck out.

Reply to qualified protection

[9] Paragraph 18 of the Defence pleads various defences of qualified protection in reliance upon s 16 of the *Defamation Act* 1889. The plaintiff pleads by paragraphs 8, 9, 10 and 11 of the Reply, that the publication was not made in good faith. But she pleads some further matters within paragraph 5 of the Reply, as additional grounds for denying the defendant qualified protection. The defendant submits that what is pleaded in sub-paragraphs 5(a), (b) and (c) is irrelevant to any defence of qualified protection.

[10] The publication complained of concerned certain petitions which had been presented to the Brisbane City Council, which the defendant was suggesting had been fabricated in that the apparent signature of the petitioner was not that of the petitioner or any authorised person. The essence of the plaintiff's case is that the defendant's words meant that she was knowingly involved in that fabrication. Paragraph 18(a) of the Defence pleads that the publication was made for the public good in that:

> "The public had an interest in:
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> (i) having debate take place in meetings of Brisbane City Council; and
> (ii) hearing such debate take place;
>
> where such debate might expose, or further or alternatively facilitate the investigation of, or further or alternatively assist in the prevention or reduction of abuse or mismanagement in the process of the presentation of petitions of the Brisbane City Council thereby enhancing the good and democratic administration of local government in Brisbane to the greater welfare of the ratepayers and residents of Brisbane."

[11] Paragraph 5(a) of the Reply pleads as follows:

> "(a) [The plaintiff] denies the publication of the imputations set out in paragraph 7 of the statement of claim was made for the public good as alleged on the basis the publication of the defamatory matter did not constitute a debate during a Brisbane City Council meeting and further on the basis it is not for the public good that defamatory matter be published without the publisher first having taken steps to ensure it was a publication of the truth (which, for the reasons set out in this proceeding, did not occur here);
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> …"

[12] This joins issue with the defendant's allegation that the publication was in the course of "a debate during a Brisbane City Council Meeting". That part of paragraph 5(a) of the Reply is not controversial. What is challenged is the plea that "it is not for the public good that defamatory matter be published without the publisher first having taken steps to ensure it was a publication of the truth (which, for the reasons set out in this proceeding, did not occur here)".

[13] The case pleaded in paragraph 5(a) is that the defence of qualified protection provided by s 16(1)(c) for a publication made for the public good, is affected by whether the defendant, whilst acting in good faith, has failed to inquire as to the truth of the matter. Because this is a distinct plea from one of bad faith, the plea would accept that the defendant did not believe the defamatory matter to be untrue.[3] It is a plea according to which s 16(1)(c), in relation to a publication for the public good, would require more of the defendant than honesty. This is not a plea that the defendant was recklessly indifferent as to the truth of the publication. Recklessness is not to be equated with carelessness or failure to check the facts: *Roberts v Bass* (2002) 212 CLR 1 at 43. The plaintiff's case is that the publication could not have been for the public good, because it cannot be for the public good that an untrue imputation is published without there having been any attempt by the defendant to assess its truth.

[14] The question of whether the publication of a certain matter is for the public good involves an assessment of the relationship between that matter and some subject which it is for the public good to ventilate: *Bridges v Australian Consolidated Press Ltd* [1967] 2 NSWR 511 at 515-516 (Walsh JA) and at 520 (Jacobs JA). In that case, and in the earlier case of *Justin v Associated Newspapers Ltd* [1967] 1 NSWR 61 at 65 (Wallace P) and 77 (Walsh JA), each of which concerned the statutory qualified privilege then available in New South Wales under a counterpart of s 16(1)(c)[4], it was said that the defence "for the public good" involved largely an objective test, but with some subjective element. Objectively, the publication had to relate to the subject which it is for the public good to ventilate. Subjectively, the person publishing the defamatory matter must have intended that the publication relate to that subject, although "such an intention would usually appear from the circumstances of the case rather than from any direct evidence of such an intention": per Jacobs JA at 520. This relevant intention was not to be confused with the defendant's motive, which is relevant to a distinct issue of good faith[5]. A question of the defendant's motive is concerned with why the defendant intended to publish matter on that subject. *Bridges* appears to hold to the contrary of the plaintiff's submission that beyond the objective and subjective tests as there explained, it is also necessary to inquire whether the defendant had done anything to check the truth of the matter.

[15] In New South Wales, the statutory defence considered in *Bridges* has been replaced by the defence of qualified privilege under s 22(1) of the *Defamation Act* 1974, for which an essential element is that the conduct of the publisher is reasonable in the circumstances. Under the common law, the defence of qualified privilege does not

[3] If the defendant had believed the matter to be untrue, there would have been bad faith: s 16(2)
[4] *Defamation Act* 1958, s 17(c)
[5] Walsh JA at 516 and Jacobs JA at 520

depend upon any reasonableness of the defendant's conduct, except in the case where by implication of the Commonwealth Constitution, a publication which would otherwise not be protected because it was made to too wide an audience, is protected by reason of the relevance of the matter to the conduct of government or political matters: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572-573. It is only in relation to this "extended privilege" that there is a condition that the publisher's conduct be reasonable. In *Roberts v Bass* (2002) 212 CLR 1, some judgments questioned whether under the common law, there should be two co-existing categories of qualified privilege in the context of political debate, of which but one has a condition of reasonableness[6]. But to the extent that the common law is relevant to the interpretation of a Code such as the *Defamation Act* 1889[7], it provides little support for the proposition that a publication is for the public good under s 16(1)(c) only if the publisher's conduct was reasonable or if the publisher has made inquiries as to the truth of the matter.

[16] No authority is cited by the plaintiff in support of the relevance of this plea. There is however some apparent support for it in the judgment of Evatt J (with whom Rich and McTiernan JJ agreed) in *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632. In that case, a newspaper published a letter to the editor, the subject of which was the alleged mismanagement of a mining company. The purported author of the letter was an unnamed shareholder. In defence of a claim by a director of the company, the newspaper pleaded defences based upon sub-ss (3) and (5) of s 377 of the *Criminal Code* (Queensland), which were in identical terms to paragraphs (c) and (e) of s 16(1) of the *Defamation Act* 1889. The jury found that the publication contained defamatory matter and referred to the plaintiff, but that it was protected by each of those provisions. The High Court held that neither provision afforded a defence and ordered a new trial.

In the view of Evatt J, in considering whether the publication was for the public good, it was necessary to weigh and consider "all the surrounding circumstances". One such circumstance was that the newspaper was published throughout Queensland, whereas the subject matter of this publication was the management of a particular company, in which the interested persons were limited to those "concerned in the company"[8]. But there were other circumstances which Evatt J considered to be relevant, as appears from this passage[9]:

> "The newspaper, assuming the role of claimant for qualified protection entirely on its own account, is in a hopeless position. It has not shown that any shareholders of the company were amongst its readers, though it is quite possible that some were. No inquiries were made by the responsible officers as to any of the facts stated in the publication. When publication was authorized, the editor did not even know that the writer was a shareholder and he acted on assumption merely.
>
> The claim of the newspaper is that it became entitled to publish untrue and defamatory imputations against the plaintiff, merely

[6] At 9-10 (Gleeson CJ); at 77-78 (Hayne J)
[7] As to which see *Calwell v IPEC Australia Ltd* (1975) 135 CLR 321 at 329-330
[8] At 658
[9] At 661-662

> because the company of which he was managing director had used this newspaper (and many others) as a means of circulating mining reports from time to time. Such a claim is *not* 'in the interest of the community,' is *not* 'for the welfare of society,' is *not* 'for the good of society in general,' is *not* 'for the common convenience and welfare of society.' I repeat the phrases used in the cases to which I have referred, and hold that the publication was *not* 'for the public good' within the meaning of sec. 377 (3) of the *Criminal Code*. On the contrary, if the claim of privilege were allowed to such an occasion, and protection given to communications of such a character, published under such circumstances, the result would be detrimental to the public welfare, and the reputation of individuals would often be injured or destroyed without any appreciate gain to the community. (Cf. *Davis & Sons v Shepstone* (1886) 11 App. Cas. 187, at pp 190, 191)"

[17] So whilst the principal reason for holding that the publication was not for the public good was that its subject matter was one in which only a very limited class of persons was interested, it appears that it was also relevant that the defendant had made no inquiry as to the facts.

[18] Evatt J appears to have applied similar reasoning in his joint judgment with McTiernan J in *Musgrave v The Commonwealth* (1937) 57 CLR 514 where a defence under s 377(3) of the *Criminal Code* was upheld. The plaintiff was a Sydney Customs Agent who brought an action against the Commonwealth for a letter written by the Collector of Customs to the plaintiff's Brisbane agent, in which it was suggested that the plaintiff had furnished information to Customs officers with the object of misleading them and reference was made to the penal provisions of the *Customs Act*. At 552-553, Evatt and McTiernan JJ said:

> "In considering whether the publication was "for the public good," the general character of the communication has to be taken into account; and the court has to decide the delicate question whether such a claim of privilege is in the interests of the community; "for the welfare of society," "for the good of society in general," or "for the common convenience and welfare of society"-to repeat the phrases used in the cases examined in *Bedford's Case*(1). Here the precise claim of privilege is that the Collector of Customs in one State of the Commonwealth is entitled to convey to a licensed customs agent carrying on business in that State, and so in frequent communication with the branch there situated, a *reasoned warning* that the agent has, in the collector's opinion, been guilty of the offence of making an untrue statement in a document intended to be acted on by the customs. Of course, if the warning deals only with the conduct of the offending licensed agent, the question of defamation can hardly arise. But we have posited the general question as covering a "reasoned warning," i.e., a warning giving the collector's reasons for coming to the conclusion that the agent's statement is in fact untrue, even although the statement of such reasons may include a relevant or necessary expression of an opinion which is defamatory of a third person."

[19] The judgment of Evatt J in *Telegraph Newspapers* has been questioned in some respects. In *Calwell v IPEC Australia Ltd* (1975) 135 CLR 321 Mason J (with whom the other members of the court agreed) noted the criticism of the judgment as drawing "too heavily on the antecedent common law when the task of the court was to interpret the statute free from any presumption that it was intended to re-enact the pre-existing law."[10] And in *Justin v Associated Newspaper*s *Ltd* Walsh JA said[11]:

> "Some discussion took place on the question whether the truth or falsity of what is published is material in deciding whether the publication is for the public good. Some statements of Evatt J in *Bedford's Case* suggest that it is. In this case, I do not think we need decide that in order to rule on this point."

[20] In *Lange*, the court noted that reasonableness of conduct "is a concept invoked in one of the defences of qualified protection under the *Defamation Codes* of Queensland and Tasmania"[12]. Many of the paragraphs within s 16(1) of the *Defamation Act* 1889 define the relevant context by reference to reasonableness: see paragraphs (b), (d) and (e) and also paragraph (h) which requires that any comment be fair[13]. But the plaintiff does not rely upon that statement in *Lange* as support for an element of reasonableness within paragraph (c) of s 16(1).

[21] On one view, there is further assistance for the plaintiff's argument in the decision of the New South Wales Court of Appeal in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419. The plaintiff sued the broadcaster of two television programs which named him as having engaged in sexual activities with boys. A jury found a number of defamatory imputations to have been made concerning him in the two programs. The trial judge then determined whether there were defences of justification and qualified privilege and concluded that there were not. That required the application of not only the law of New South Wales but of certain other jurisdictions including Queensland. In relation to the broadcast of the programs in this State, the defendant pleaded defences of qualified protection on grounds which included publication for the public good: s 16(1)(c). The Court of Appeal first discussed whether the plaintiff had proved lack of good faith according to s 16(2). In relation to each program, the trial judge (Levine J) had held there was a reckless indifference to the truth of what was published. In the view of the Court of Appeal, this was not sufficient to discharge the plaintiff's onus of proof in relation to the absence of good faith, according to the terms of s 16(2). The court held that reckless indifference as to the truth or a lack of an honest belief in the truth of the imputations did not require the conclusion that the defendant "did not believe the defamatory matter to be untrue".

[22] In relation to the second program, there was a further finding of an improper motive, by which bad faith was proved. However for the other broadcast, the court had to consider whether the qualified protection in relation to public good applied, where according to the trial judge's findings, the absence of good faith had not been proved. Levine J had held that the "public good" defence required the satisfaction

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[10] at 329-330
[11] at 79
[12] at 573, citing *Criminal Code* (Qld) s 377 and the *Defamation Act* 1957(Pos) s 16
[13] *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 329

of both the objective and subjective tests of public good according to *Justin v Associated Newspapers Ltd* and *Bridges v Australian Consolidated Press Ltd*, as I have already discussed. His Honour concluded that "whilst there was evidence in relation to each programme that it related to public interest, or that imputations intended to be conveyed related to public interest, that was not sufficient to establish that the publication was for "the public good", absent evidence from the appellant that that was its purpose via its servants and agents"[14]. On one view that was more demanding of a defendant than the objective and subjective tests described in *Justin* and *Bridges*, by which the publication had to be sufficiently connected with a subject "for which it is for the public good to ventilate" and the defendant must have intended the publication to relate to that subject. The subjective test, as explained in these cases, was to prevent the qualified protection arising by accident in a context where although the publication objectively viewed related to a subject which it was for the public good to ventilate, the publisher intended it to relate to something quite different[15].

[23] In the Court of Appeal's judgment, more than satisfaction of these objective and subjective tests was required. The Court held that in considering the question of whether the publication was "for the public good", as distinct from the issue of good faith, it is relevant to consider at least the recklessness of the defendant. At [1282] the court said:

> "In no objective sense could it therefore be said that publication could be 'for the public good', where it is made with reckless indifference to the truth of what is published, even if the subject matter of the publication could be taken to be a subject which it is for the public good to ventilate. That suffices to deny the defence. This is so, even if it could be said that something published with reckless disregard for its truth or falsity satisfied the subjective element, as being with the intention of ventilating the subject for which it is for the public good to ventilate."

[24] So according to *Marsden*, in a case where good faith is not disproved, and the subject matter is one which it is for the public good to ventilate, there is no protection if it is made with reckless indifference as to the truth. This judgment would make it relevant to inquire, for the purposes of the "public good", as to whether any inquiry was made by the defendant at least if that question was raised by a plea of recklessness.

[25] As I read paragraph 5(a) however, it does not plead a reckless disregard for the truth. The absence of any inquiry would be a relevant fact in assessing whether the defendant was reckless as to the truth, but it would not of itself prove recklessness. *Marsden* does not hold that a mere failure to inquire denies the publication a character of being for the public good. But it does suggest a need for more than a connection between the subject of the defamatory matter and a subject which it is for the public good to ventilate, according to the objective and subjective tests from *Justin* and *Bridges*.

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[14] At [1279] in the judgment of the Court of Appeal

[15] See *Justin* at 65 per Wallace P and *Bridges* at 520 per Jacobs JA

[26] It is possible that Evatt J in *Bedford's* case saw the newspaper's conduct as reckless in this sense, in which case his judgment, like that in *Marsden* would not support a plea which alleges merely a failure to make inquiry and not a reckless indifference as to the truth. On another view however, his judgment, with which another two members of the court agreed, does appear to support the relevance of what is pleaded in paragraph 5(a).

[27] If there is an arguable basis for what is pleaded, the plaintiff should be able to pursue it at the trial. Against this, the defendant submits that there is need for particular rigour in the definition of the issues in a case such as this, which will be tried by a jury. It is argued that there is a risk that this allegation will be confused with those relevant to the issue of good faith, which is problematical given that the plaintiff must prove the absence of good faith, whilst the defendant must establish the facts by which the publication would be held to have been for the public good. But if there is an arguable basis for the relevance of this plea, that complication will have to be overcome by appropriate questions of and directions to the jury. If ultimately it should be held that a mere failure to inquire is relevant, there is a risk that the trial could miscarry by striking out this plea. The better course is to not strike it out, but to allow the relevant facts to be found by the jury in case an appellate court can be persuaded of its relevance.

[28] Paragraph 5(b) of the Reply relates to the pleas of qualified protection in paragraphs 18(a), (b) and (c), which are pleaded in terms of s 16(1)(c), (e) and (h) respectively. Paragraph 18(b) pleads that the publication was made for the purpose of giving information to other Councillors and members of the public with respect to the "subject of the abuse or mismanagement of the process of the presentation of petitions to the Brisbane City Council …" Paragraph 18(c) pleads that the subject of public interest was the "abuse or mismanagement of the process of the presentation of petitions to the Brisbane City Council".

[29] In reply, the plaintiff pleads in paragraph 5(b) as follows:

> "denies the publication of the imputations was for the public good (paragraph 18(a) of the defence) for the purpose of giving information to other councillors and members of the public (paragraph 18(b) of the defence) or in respect of a subject of public interest (paragraph 18(c) of the defence) on the bases the defendant published the defamatory matter in an attempt to improperly:
>
> (i) make political gain against the plaintiff; or
>
> (ii) discredit the plaintiff;
>
> <u>Particulars of impropriety</u>
>
> A. the matter was published when for the reasons set out in this proceeding it was unlawfully defamatory;
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> B. the matter was published with contumelious disregard for the plaintiff's right set out in these proceedings."

[30] Again, the plaintiff makes it clear that this is a plea which is distinct from her plea of absence of good faith. It is an allegation that the publication is not within any of paragraphs (c), (e) or (h) of s 16(1), quite apart from whether it was made in good faith. The defendant submits that it should be struck out, (again) because the allegations are relevant only to the issue of good faith, and their presence here would tend to confuse the issue of good faith with the issue of whether the publication was otherwise within the relevant paragraph of s 16(1), for which the onus is upon the defendant.

[31] The first question then is whether this plea could be relevant to the question of whether the publication was for the public good. The subject of the abuse or mismanagement of the presentation of petitions to the Council was a subject which it was for the public good to ventilate. And plainly the defendant's publication was intended to relate to that subject. The publication would appear therefore to satisfy the objective and subjective tests in relation to public good according to the cases which I have discussed. What the plaintiff pleads here in reply is the reason why the defendant intended to make a statement on that subject. The defendant submits that this is a pleading of the defendant's motive, which is relevant only to good faith. In *Bridges v Australian Consolidated Press Ltd*, Walsh JA[16] and Jacobs JA[17] warned of the risk of confusion in relation to this defence between the publisher's purpose in the sense of the intended relationship between the defamatory matter and the relevant subject, and the motive for the publication. Jacobs JA there said that:

> "It is very important not to confuse purpose in this sense with motive which in each case will be very largely if not wholly a question arising under the subject matter of 'good faith'."

[32] The plaintiff pleads the same state of mind as an improper motive establishing a lack of good faith[18].

[33] The same state of mind is then pleaded in response to the defence based upon s16(1)(e). The plaintiff denies the allegation that the publication was made for the purpose of giving information to councillors and members of the public with respect to the relevant subject, because the defendant had a different purpose which was to make political gain and discredit the plaintiff. But those purposes are not inconsistent. Conceivably, the defendant's immediate purpose was to communicate information to other councillors and members of the public, but to the ultimate end of making political gain and discrediting the plaintiff.

[34] In *Rajski v Carson* (1988) 15 NSWLR 84, the New South Wales Court of Appeal had to consider the meaning of the term "purpose" within s 17F of the *Defamation Act* 1974 (NSW), which provided a defence of absolute privilege for a publication to or by the Legal Aid Commission of New South Wales, when the publication was made for the purpose of the execution or administration of the Act by which the Commission was constituted. The primary judge (Hunt J) held that there was a

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[16] At 516
[17] At 520
[18] Paragraph 9 of the Reply

clear demarcation in the context of this provision between purpose and motive, which he explained as follows[19]:

> "What the plaintiff has confused here is the *motive* with which the publication has been made and the *purpose* which that publication served. Someone's purpose is the result which he seeks to achieve. His motive is the reason why he seeks to achieve that result. If a defendant has used a privileged occasion to publish for a reason other than that for which the privilege is given (which is usually described as an indirect motive) he is said to have acted maliciously."

By a majority, an appeal against his judgment was allowed, and the majority rejected the distinction made in the passage I have set out, in the specific context of s 17F. But this was a defence of absolute privilege, rather than qualified privilege where there is a distinct condition of good faith, for which the publisher's motive is relevant, and for which the statute places the onus of proof on the plaintiff. Under s 16(1)(e), the defendant must satisfy the trial judge that the publication was made in the circumstances there prescribed subject to a decision on any disputed fact being decided by the jury[20]. If in this context there is no distinction between the relevant purpose of the defendant and the defendant's motive, it would be impossible to direct the jury as to the onus of proof in respect of the defendant's state of mind. In this particular context, the distinction between purpose and motive, expressed by Hunt J in *Rajski*, is one which I would respectfully adopt. It is, with respect, a useful and workable distinction in the context of s 16(1)(e) of the *Defamation Act* 1889, for which the relevant purpose as referred to in that paragraph must be distinguished from the defendant's motive, as referred to in s 16(2). It is a distinction which corresponds with that in the criminal law between intention and motive (as expressed in s 23 of the *Criminal Code*).

[35] In the present case, the plaintiff would appear to accept that the defendant intended to give information to other councillors and the public, because it was by that means, on the plaintiff's case, that the defendant hoped to discredit her and to make political gain. The alleged political "purposes" of the defendant provide no basis then for denying that the publication was for the purpose of giving information to that audience. Rather, the alleged objective of political gain explains why the plaintiff would have the purpose of giving information to that audience. The relevance of that objective is in the context of the consideration of good faith, and specifically whether the defendant was actuated by ill will or any other motive which was improper considered against the purpose for which protection is provided by s 16(1)(e).

[36] In my view the allegation that the defendant was attempting to make political gain and to discredit the plaintiff is relevant only to motive and good faith, and it is not otherwise a proper plea in answer to a defence based on s 16(1)(c) or (e). There is then the question of its relevance or otherwise to the defence based upon s 16(1)(h). The Reply pleads the same purposes of the defendant as the basis for a denial that the publication was "in respect of a subject of public interest". Insofar as this is an

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[19] (1986) 4 NSWLR 735 at 742

[20] *Calwell v IPEC Australia Ltd* (1975) 135 CLR 321

intended denial of the defendant's allegation that the purpose of the publication was the discussion of a subject or public interest, it is not a proper plea, again for the reason that it is relevant only to motive. And a plea that the defendant had certain political purposes would not gainsay the allegation that the publication was made *in the course of* the discussion of a subject of public interest.

[37] I conclude that paragraph 5(b) should be struck out.

[38] I turn then to paragraph 5(c) in which the plaintiff:

> "(c) Denies the publication of the imputations was concerning the abuse or mismanagement of the process of the presentation of petitions to the Brisbane City Council on the basis that allegation is not true where the publication of the imputations was concerning the alleged improper political tactics of the plaintiff and other Liberal Councillors and her and their suitability to hold the office of Councillor."

[39] The defendant submits that this is but a more particular pleading of what is alleged in paragraph 10 of the Reply, which is that "the publication was not relevant to the matters of information, public good and public interests particularised in paragraph 18 of the defence". From this it is said that the pleading is inconsistent with what the High Court held in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 227-229. The defendant does not apply to strike out paragraph 10 which he apparently concedes is relevant to the issue of good faith. Again, it is submitted that if this is no more than the same allegation which is relied upon in relation to good faith, there is a risk of confusion because of where the onus of proof lies in relation to different issues. Paragraph 5(c) does not deny that there was a subject of public interest, in the course of the discussion of which the words were spoken. It pleads that the words concerned another subject, that is that they were not relevant to the subject of public interest. In *Bellino* at 227-228, Dawson, McHugh and Gummow JJ said that Starke J in *Bedford* erred in saying that there was an issue for the trial judge to determine of the relevance of the publication to the discussion in the course of which it was made, in addition to that being an issue for the jury in considering good faith. As I read it, paragraph 5(c) is relevant only to bad faith, which is pleaded elsewhere, and it should be struck out.

Particulars of paragraph 5

[40] The defendant seeks particulars of paragraphs 5(a) if I conclude, as I do, that it should not be struck out. In the rule 444 letter, the defendant's solicitors sought particulars "of each and every step which (the plaintiff) alleges that (the defendant) should have taken including particulars of when, where and how each step should have been taken" (to ensure that the publication was true). The rule 445 letter did not provide those particulars other than by repeating the assertion that no steps had been taken. The question is whether, absent the particulars requested, the defendant is fairly informed of the case he must meet. In my view he is. The case is that he took no steps at all. If he can show that he did take some steps to ascertain the truth of these matters, in my view it would not be open to the plaintiff to lead evidence as

to a particular step which nevertheless was not and should have been taken, except in so far as she has otherwise pleaded that particular steps should have been taken, as she has in paragraphs 7(b)(ii)H and 9(b)(v) in response to other defences.

Reply to the *Lange* defence

[41] In paragraph 20 of the Defence the defendant pleads that he has a good defence based upon *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. He pleads that the *Defamation Act* 1889 is invalid to the extent that it would operate to make him liable for damages, because it infringes the requirement of freedom of communication imposed by The Constitution. It is further pleaded that the defendant is entitled "to the protection of the extended category of qualified protection which reflects the requirement of the Australian Constitution", which is a plea that the defendant is entitled to a defence according to what the court in *Lange* decided was "the extended category of qualified privilege" under the common law. From that, the defendant pleads matters which would be appropriate to a plea under the common law in relation to this extended category of privilege. In particular the defendant pleads that his conduct in making the publications was reasonable in all the circumstances.

[42] In paragraph 7 of the Reply, the plaintiff pleads that the *Defamation Act* 1889 does not impermissibly burden freedom of communication about government and political matters and is a law reasonably appropriate and adapted to serving the system of government prescribed by The Constitution, so that that Act is valid[21]. She further pleads that the defendant is not entitled to rely upon any extended defence of qualified protection on certain grounds, including that "it was not reasonable to publish the matter referred to … in the circumstances". Particulars of those circumstances are then set out. The defendant's argument is that "these particulars are not capable of proving unreasonable publication for the purpose of this defence", and the defendant applies to strike out some of the particulars.

[43] The first of these particulars alleges that the defendant published "in contumelious disregard of the plaintiff's rights".[22] This is effectively the same allegation which is pleaded in paragraph 9 of the Reply, in relation to good faith. Later in these reasons, I discuss the plea in paragraph 9 and conclude that it is arguably relevant to good faith. In my view that is its only relevance. I cannot see that its deletion from paragraph 7 will prejudice the plaintiff, but it would avoid the risk of some confusion because of the differing burdens of proof between paragraphs 7 and 9. It should be struck out.

[44] Particular E alleges that the publication was excessive, in that the defendant knew or should have known that it would be received by the media. This seems inconsistent with what was said in *Lange* as to the need to extend the common law defence of qualified privilege to facilitate extensive communication about government and political matters because, with a few exceptions, the common law categories of qualified privilege had protected only occasions where defamatory matter was

[21] *Lange* at 567
[22] Paragraph 7(b)(ii)A

published to a limited number of recipients and not to a large audience such as through the media[23]. This particular is in my view irrelevant and ought to be struck out.

[45] Paragraph F of the Particulars alleges that the manner of the publication was *excessive* and was motivated by ill will and by a motive of obtaining an improper political advantage over the plaintiff. The defendant submits that this is inconsistent with this passage from *Lange* at 574:

> "As we have explained, the existence of ill will or other improper motive will not itself defeat the privilege. The plaintiff must prove that the publication of the defamatory matter was *actuated* by that ill will or other improper motive. Furthermore, having regard to the subject matter of government and politics, the motive of causing political damage to the plaintiff or his or her Party cannot be regarded as improper (294). Nor can the vigour of an attack or the pungency of a defamatory statement, without more, discharge the plaintiff's onus of proof on this issue".

I do not see this particular as inconsistent with what is there said, which is that the existence of ill will or improper motive, of itself, would not defeat the privilege but that the privilege would be defeated if the plaintiff could prove that the publication was *actuated* by that ill will or other improper motive. But as the court also said at 574, that is an issue which would arise only once it is held that the publisher had proved that it had acted reasonably and was otherwise entitled to the extended privilege. I see the particular as relevant to good faith, but not to reasonableness in this sense. Even as to good faith, as a plea in response to a *Lange* defence, it would seem to be inconsistent with the court's statement that "having regard to the subject matter of government and politics, the motive of causing political damage to the plaintiff or his or her party cannot be regarded as improper". The present question is whether it is relevant to reasonableness for a *Lange* defence, if such a defence is available. In my view it is not, and this particular should be struck out.

[46] Paragraph I of the Particulars alleges that the defendant's language in the publication was "unnecessarily sensationalist and provocative". It is said that this is inconsistent with the passage from *Lange* which I have set out above. But in that passage, it was said that the vigour of the attack or the pungency of a defamatory statement *without more* could not discharge the plaintiff's onus of proof of bad faith. Again, that was not a statement as to what was relevant in the assessment of the reasonableness of the defendant's conduct. To the extent that a particular in these terms has any relevance, it is in relation to an issue of good faith, so that (again) the particular would tend to confuse and should be struck out.

Other complaints

[47] The next complaint is in relation to paragraphs 7(b)(ii)H and 9(c)(v) of the Reply where it is alleged that "the defendant did not take proper steps insofar as they were

[23] *Lange* at 572

reasonably open to verify the accuracy of the publication". The defendant seeks particulars of the steps which should have been taken. The plaintiff has provided particulars in these terms:

> "In response to this complaint the plaintiff says that the defendant did not consult the plaintiff before making the publication and did not conduct any inquiry of third parties, such as the petitioners, to determine whether the plaintiff had been personally involved in the compilation of the petitions, each of which steps were proper and reasonably open having regard to the gravity of the imputations published".

[48] The defendant says that these particulars are insufficient, because they are too general and that they fail to identify the "third parties" from whom inquiry should have been made. Earlier in these reasons, I considered whether particulars should be ordered of the allegation in paragraph 5(a) that the publication was not for the public good because the defendant had not "taken steps to ensure it was a publication of the truth". Here the allegation is that the defendant did not take "*proper* steps" and "insofar as they were reasonably open". The plaintiff's case in relation to the absence of "public good" is that no steps at all were taken, whereas in this part of the pleading she joins issue with the defendant's allegation of reasonableness and, in paragraph 9, she pleads lack of good faith. In paragraphs 7 and 9 some particulars of what steps should have been taken, have been volunteered. Rather than simply relying on the absence of any inquiry, she says that certain inquiries should have been made of third parties. The problem then is that she does not fairly inform the defendant of who those persons were, at least by some description or categorisation. I conclude that further particulars should be ordered of each of these allegations, in that the plaintiff should provide particulars of the parties from whom the defendant ought to have inquired, by identifying those persons by name or description.

[49] The next complaint relates to paragraph 9 of the Reply, in which the plaintiff pleads that the defendant was actuated by ill will or some other improper motive, which was to "improperly discredit the plaintiff, or improperly make political gain by publishing a sensational and provocative allegation of and concerning the plaintiff in contumelious disregard of the plaintiff's rights". The defendant argues that this allegation of "contumelious disregard of the plaintiff's rights" is irrelevant to the question of good faith, because it is not a matter specified in s 16(2) of the *Defamation Act* by which the absence of good faith is to be judged. It is said that a consideration of this issue will distract the jury. That problem could be overcome by the trial judge's directions as to good faith. An allegation that the defendant acted in contumelious disregard of the plaintiff's rights has some potential relevance to the allegation that he was actuated by ill will towards the plaintiff. Although it does not seem to add anything significant to the case, I do not see that it is so irrelevant that it should be struck out, and I do not think that its continued presence within the pleadings will be likely to affect a fair trial.

[50] The next order sought is for the striking out of certain particulars of paragraph 9. As to the alleged contumelious disregard of the plaintiff's "rights", particulars have been provided of the rights to which the plaintiff alleges she was entitled. Those

rights are identified as a right not to be "unlawfully defamed" and a right not to be defamed without first being given an opportunity to respond to the relevant allegations. Particulars are provided of the respects in which the defendant's conduct is said to have been contumelious.

[51] The defendant submits that these particulars assert the existence of "rights" which are not recognised by law. Particular (a) is that the plaintiff has a right not to be unlawfully defamed, which seems uncontroversial. Particular (b) is that the plaintiff has a right to be protected from defamatory allegations without first being given an opportunity to respond to them. This is a mis-statement of the law. This case is complicated enough without this irrelevancy and in my view paragraph (b) should be struck out.

[52] Paragraph (c) of the Particulars of paragraph 9 contains the alternative allegation that the defendant believed the publication to be untrue. That is curious because the defendant would be expected to plead that as a separate allegation, the proof of which of itself would prove bad faith, rather than as a particular of a plea of ill will or improper motive. Nevertheless, it is a relevant matter to be pleaded, and for present purposes at least, it must be assumed that the pleaders have a proper basis for pleading it. Paragraph (c) of the particulars will not be struck out.

[53] Alternatively, the defendant seeks further and better particulars of the facts and circumstances relied upon to allege that the publication was *actuated* by ill will or some other improper motive. He submits that there is "nothing of the other facts and circumstances which will be relied upon to show not merely that such ill will or improper motive existed … but also that it actuated the publication". If proper particulars are pleaded as to the defendant's state of mind, it seems to me to be sufficient for the plaintiff to then allege the causal connection between that state of mind and the publication by simply pleading that the publication was actuated by it, without more.

[54] The defendant also says that the particulars are insufficient to support a case of bad faith. He does not apply to strike out the allegation of bad faith, but instead he argues that there must be some further particulars to be provided. By *Uniform Civil Procedure Rules* r 150(2), a party must plead any fact from which any matter within sub-rule (1) is claimed to be an inference, and such matters include malice, ill will or motive. In principle, it is open to the plaintiff to seek to prove that these matters, not by the drawing of an inference, but by direct evidence. In this case however the plaintiff's case is likely to depend upon what can be inferred. The plaintiff will be held to the facts which she pleads as the basis for that inference. It is the plaintiff's difficulty if, as the defendant argues, the present particulars do not support that inference. In my view the plaintiff cannot be compelled to provide further particulars but her resistance to their provision has an obvious consequence in limiting her case.

Conclusions

[55] Accordingly there should be orders as follows:

1. Paragraphs 4(b)(ii), 5(b), 5(c), 7(b)(ii)A, 7(b)(ii)E, 7(b)(ii)F, 7(b)(ii)I, 9(b) of the Reply will be struck out.

2. The plaintiff will be ordered to provide particulars of paragraphs 7(b)(ii) and 9(c)(v) by specifying the parties from whom the defendant should have inquired as to the accuracy of the publication, by identifying those persons by name or description.

3. The application filed on 10 June 2004 is otherwise dismissed.

[56] I shall hear the parties as to costs.