Malice, Qualified Privilege and *Lange*

In this article Glen Sauer examines the High Court's decision in Roberts v Bass on the issue of malice, and how it applies to the defamation defence of qualified privilege, as well as the Lange extended qualified privilege defence.

The recent High Court decision of *Roberts v Bass* [2002] HCA 57 (12 December 2002) significantly affects the interpretation of the common law relating to malice as it applies to defeat a defence of qualified privilege in relation to defamatory publications. A majority of the High Court has held that, at least in cases involving government or political communication, authority which has developed from *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, that a lack of honest belief would defeat the defence of qualified privilege (and presumably comment), is in error.

The High Court took a practical, rather than overly technical, approach to the law of qualified privilege. The decision confirms that qualified privilege is a robust defence of great utility for defendants other than the mass media.

It remains to be seen whether a similarly robust approach will now be applied to the "extended" qualified privilege defence as formulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, particularly with respect to the requirement of reasonableness by a publisher seeking to rely on this defence.

The comments of Justice Kirby may provide some comfort to those who might read this case:

> *"In Chakravarti v Advertiser Newspapers Ltd, I remarked that the law of defamation was unnecessarily complicated. The present case, reduced to its essentials, should have been relatively straightforward. Unfortunately, it did not prove to be so." (at para 126, per Kirby J).*

THE DEFENCE OF QUALIFIED PRIVILEGE AND THE *LANGE* EXTENDED DEFENCE

The defence of qualified privilege is available at common law in all States except Queensland and Tasmania. In those States, a similar defence is created by statute. The essential elements of the defence are as follows:

(a) The publisher must have a duty (legal, social or moral) to publish the material;

(b) The person to whom the publication is made has a reciprocal duty to receive or an interest in receiving the information;

(c) The publisher must have an honest belief in the truth of the material; and

(d) The publication is made without malice.

An additional defence of qualified privilege is available under s22 of the *Defamation Act* in NSW, in circumstances where a report is on a matter of public interest, published to people who have an interest in knowing about the matter, and the conduct of the publisher in publishing the material is reasonable.

The principle behind the defence is that there are occasions when it is in the public interest that people be able to speak freely when it is their duty to do so without fear of liability. Occasions covered by the defence include where an employer discloses information about an employee to a business partner in order to protect his property, or about the employee's competence to a new employer. A person may respond to a published attack, though the response must relate to the subject matter of the attack and not be disproportionate to it.

The defence has been notoriously difficult for the media to establish. Generally, the courts do not accept that mass media organisations have a duty to provide the information they do and that the mass audience has a reciprocal duty to receive it. The author's and the publisher's honest belief in the truth of the material and reasonable behaviour in publishing it will be carefully scrutinised.

A person researching a story must at least:

(a) Contact or make conscientious attempts to contact the person or company referred to in any defamatory report and put any allegation to be made in the story to them;

(b) If they comment on those allegations, their comments should be published;

(c) Take care to use reliable sources and each available source of information; and

(d) Check the accuracy and authenticity of any material contained in any report against other independent sources.

As a result of the High Court's decision in *Lange*, the categories of information which attract qualified privilege now include "a communication made to the public on a government or political matter".

THE RELEVANT FACTS

Bass was, at the time of publication of the matters complained of, a South Australian Member of Parliament. The appellants, Roberts and Case, opposed Bass' re-election and were involved with the production and distribution of three publications:

1. a postcard which stated: "Dear Taxpayer, This is the postcard your politician Sam Bass should have sent you from the Pacific island paradise where he is enjoying a winter break at your expense. Geoff Roberts. Clean Government Coalition. P.S. When you vote, put Sam Bass last." (the "**postcard**");

2. a pamphlet containing several pages, including a caricature of Bass and a false "Ansett Australia Frequent Flyer Activity Statement", amongst other things (the "**pamphlet**"); and

3. a mock how to vote card stating "When you vote, PUT SAM BASS LAST." (the "**how to vote card**").

Each publication was created by Roberts. Case was connected only with the third publication, which he handed out to electors as they came to cast their votes at a polling station.

Bass lost his seat at the election by a narrow margin and then commenced proceedings for defamation against Roberts and Case in the District Court of South Australia.

With respect to the postcard, Bass pleaded the following imputations:

(a) That [Bass] had taken a holiday trip to Nauru at the expense of the taxpayers of the seat of Florey;

(b) That [Bass'] holiday at Nauru was for his own enjoyment, at the expense of the taxpayers of the seat of Florey, and not in the proper pursuit of his duties as a member of Parliament and as the member of the seat of Florey."

Bass pleaded the following imputations in relation to the pamphlet:

(a) That [Bass] had corruptly used his position as a member of Parliament to obtain a holiday at Nauru for his own benefit;

(b) That [Bass] whilst attending the Nauru Resort was neglecting his responsibilities to his constituents in the seat of Florey in Parliament;

(c) That [Bass] had taken advantage of his position as a member of Parliament to obtain a free holiday for his own purposes;

(d) That [Bass] had used his position as the member of Parliament to accrue Frequent Flyer Points for his own use and for the use of the members of his family;

(e) That [Bass] had on numerous occasions used his position as a member of Parliament to accrue Frequent Flyer Points for his own benefit and for the benefit of the member of his family; and

(f) That overseas trips taken by [Bass] in the course of his Parliamentary duties were in fact undertaken not in pursuit of his duties as a member of Parliament and the interests of his constituents in the seat of Florey but for his own interests and recreational pursuits.".

In relation to the how to vote card, Bass pleaded the following imputations:

(a) That [Bass] had spent $32,000.00 of taxpayers' money on overseas travel;

(b) That [Bass] had spent $32,000.00 of taxpayers' money for overseas travel for the purpose of his own enjoyment and not for the proper purpose of such travel, namely to enhance the [respondent's] knowledge of issues relevant to the better performance of his role as a member of Parliament;

(c) That [Bass] had taken numerous overseas trips for his own benefit and enjoyment at the taxpayer's expense;

(d) That [Bass] had taken numerous overseas trips for his own benefit and enjoyment and not for the intended purpose of such trips, namely to enable him to better serve the interests of the Parliament of South Australia and the members of this electorate;

(e) Contrary to his responsibility as the member of Parliament for Florey [Bass had] failed to take appropriate steps to prevent clandestine arrangements being put in place in respect of the management of the Modbury Hospital, contrary to the interests of the members of the electorate of Florey and the public of South Australia generally;

(f) That [Bass] had put the rights of those interested in the rights to possess and utilise guns ahead of the safety of members of ordinary families;

(g) That [Bass] had not spent sufficient time in his electorate to properly discharge his duties as the member of the seat of Florey;

(h) That [Bass] was not spending sufficient time in the electorate of Florey to enable him to adequately fulfil his duties as the member of Florey; and

(i) That if [Bass] was elected to the member of Florey and then subsequently elected as Speaker of the House of Assembly then he would spend less time than the time that he was currently spending in the electorate."

In their respective defences in the District Court, Roberts and Case denied that the imputations were conveyed, and, in the alternative, relied on the defences of truth, fair comment and qualified privilege. Roberts and Case did not raise two separate defences of common law (or "traditional" or "ordinary" as Justice Kirby put it) qualified privilege and "extended" or "constitutional" qualified privilege. Roberts and Case simply pleaded that the matters complained of were "published on occasions of qualified privilege". Their respective defences went on to say that each publication was on "a matter concerning government and political matters affecting the electors... and the choice for electors at an election."(at para 132 per Kirby J).

Bass in reply contested the reasonableness of Roberts' and Case's conduct and belief as to the truth of their publications and alleged actual malice against them.

AT FIRST INSTANCE IN THE DISTRICT COURT

District Court Justice Lowrie found that the pleaded imputations were conveyed and were defamatory of Bass. His Honour held that the defences of fair comment and common law qualified privilege pleaded by Roberts and Case failed.

His Honour applied the English Court of Appeal decision in *Braddock v Bevins* [1948] 1 KB 580, which established that communications between candidates and electors were privileged occasions, to find that Roberts' and Case's publications were made on occasions of privilege. However, Justice Lowrie held that this defence of common law qualified privilege was defeated by malice on the part of Roberts and Case. His Honour noted that:

"the conduct of [Roberts] was tantamount to using any area of apparent criticism of [Bass] to injure his reputation and cause him to lose office. This purpose is not a proper motive" (at para 54, as quoted by Gaudron, McHugh and Gummow JJ).

Similarly Case's "dominant motive was to injure [Bass'] reputation and remove him from office, and, as such, it was an improper motive" (at para 55, as quoted by Gaudron, McHugh and Gummow JJ). Justice Lowrie thus viewed the conduct of Roberts and Case as malicious.

His Honour considered that, while Roberts and Case's respective defences raised the defence of *Lange* qualified privilege, this defence was not available because their actions had not been reasonable.

APPEAL TO THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

Roberts and Case appealed the decision of Justice Lowrie to the Full Court of the Supreme Court of South Australia. Interestingly, Bass did not challenge that Roberts and Case's publications were made on occasions of common law qualified privilege, and Roberts and Case did not plead the defence of *Lange* qualified privilege. Roberts and Case challenged Judge Lowrie's decision principally on the issue of malice.

The Full Court upheld the verdicts in favour of Bass, but differed from Justice Lowrie in relation to the issues of motive and purpose.

Justices Prior and Martin held (in separate judgments) that the evidence was sufficient to justify the conclusion reached by Justice Lowrie that Roberts had an improper motive and lacked an honest belief in the truth of his publications, while Case was recklessly indifferent to the truth (at para 56 and 60 per Gaudron, McHugh and Gummow JJ).

Justice Williams, on the other hand, found that Roberts and Case lacked an honest belief in the truth of their publications but was unable to identify an improper purpose beyond the legitimate purposes of "becoming over-enthusiastic in the support of their electoral cause" and injuring Bass' prospects of re-election (at para 59, per Gaudron, McHugh and Gummow JJ).

APPEAL TO THE HIGH COURT

Issues before the High Court

Roberts and Case challenged the Full Court's finding of malice.

A preliminary issue arose as to whether the parties could depart from the positions that they adopted in the Full Court on the question as to whether the publications were made on occasions of qualified privilege. In the Full Court, Bass did not appeal against the trial judge's findings that the occasions were privileged, while before the High Court Bass argued that the occasions were not privileged. Likewise, in the Full Court Roberts did not appeal, and Case did not press his appeal, against the trial judge's findings that the publications were not protected by the extended defence of qualified privilege recognised by the High Court in *Lange*, while before the High Court they both sought to rely on the *Lange* defence (at para 49 per Gaudron, McHugh and Gummow JJ).

A majority of the High Court (Kirby J dissenting) found that Roberts and Case could not rely on the *Lange* extended defence. In a joint judgment, Justices Gaudron, McHugh and Gummow opined that the parties could not depart from their cases as pleaded but observed that neither party would suffer any prejudice as a result of this decision (at para 72 per Gaudron, McHugh and Gummow JJ). In separate judgments, Chief Justice Gleeson, Justice Hayne and Justice Callinan also concluded that the parties were bound by their cases as pleaded. However, Justice Kirby noted a lack of procedural unfairness, that the constitutional issue had been adequately notified and argued, that resolution of the constitutional issue was a matter of general legal importance, and that it was imperative that the High Court should clarify the scope and operation of the "common law" privilege in light of *Lange* constitutional qualified privilege. His Honour expressed sympathy for the parties, noting that:

> *"it is unsurprising that the parties, and the courts below, should have experienced a measure of difficulty in identifying the legal principles that were applicable to the case. The same problems have arisen in this Court. As I approach these appeals, this Court has the duty to clarify the applicable law – not only for the resolution of the present dispute but also to afford guidance for cases that will present similar questions in the future." (at para 125 per Kirby J).*

However, it was the majority's opinion that it need only consider the substantive issue of the application of the defence of qualified privilege to the matters found to be defamatory.

However, the High Court also considered, by way of *obiter*, the application of the constitutional implication of freedom of communication on political matters as expressed in *Lange*.

The High Court's decision

A majority of the High Court rejected the finding by the Full Court of the Supreme Court of South Australia of malice against Roberts and Case, which had defeated Roberts' and Case's defence of qualified privilege. Gaudron, McHugh, Gummow and Kirby JJ upheld the appeals of both Roberts and Bass, Gleeson CJ and Hayne J dismissed the appeal of Roberts but upheld the appeal of Case, while Callinan J, dissenting, dismissed both appeals.

When does malice destroy a (common law) qualified privilege defence?

The High Court considered in detail the application of the defence of common law qualified privilege to the matters found to be defamatory, and in particular, when malice will destroy a qualified privilege defence.

The High Court found that a purpose of defeating someone in an election is not improper. This makes very good sense because otherwise qualified privilege would offer no real protection to competing politicians and lobby groups.

Chief Justice Gleeson noted that a "motive of injuring a candidate by diminishing his or her prospects of election does not constitute malice; that would be repugnant to the very basis of the privilege in electoral contest". Indeed, "targeting" an election candidate is not improper (at para 39 per Gleeson CJ). However, "it would be wrong to think that, because such a motive does not constitute malice, it negates malice. If it were so, electoral contests would for practical purposes constitute a defamation-free zone." (at para 12 per Gleeson CJ).

Chief Justice Gleeson noted that "mere absence of a positive belief" in the truth of what is said does not constitute malice" (at para 15 per Gleeson CJ). However, his Honour considered that a qualified privilege defence would not be available where the defendant published the defamatory material, knowing it to be false, or not caring whether it was true or false, noting that this state of mind is sometimes described as "recklessness" (at para 13 per Gleeson CJ). Justice Hayne agreed with the conclusions reached by Chief Justice Gleeson (at para 230 per Hayne J).

Justice Callinan took a similar approach as Chief Justice Gleeson and Justice Hayne. His Honour appeared to consider that utter indifference or recklessness

with respect to the truth or falsity of defamatory matter constituted malice (at para 303 and 305, per Callinan J). His Honour further considered that the content and tone of the language used in the defamatory publications went at least some way towards establishing malice, citing the "dogmatic, categorical and unpleasant tone and content" of the documents (at para 289 per Callinan J). Justice Callinan also noted that in order to defeat a defence of qualified privilege it will "suffice for the plaintiff to demonstrate that the publication was not made out of a non-malicious motive, or motives: the presence of *a* malicious motive will colour and inescapably taint the conduct of a publisher" (at para 292 per Callinan J).

In a joint judgment, Justices Gaudron, McHugh and Gummow, however, did not endorse the Chief Justice's finding that "recklessness" destroys the defence of qualified privilege. Their Honours defined malice as:

> *"a motive for, or a purpose of, defaming the plaintiff that is inconsistent with the duty or interest that protects the occasion of the publication". (at para 79 per Gaudron, McHugh and Gummow JJ).*

Their Honours noted that an improper motive should not be confused with the defendant's "ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication" (at para 76 per Gaudron, McHugh and Gummow JJ).

However, the joint judgment noted that, generally, proof that a defendant knew that his or her statements were untrue was "almost conclusive evidence" of malice (at para 76 per Gaudron, McHugh and Gummow JJ). However, even knowledge that the defamatory statement was false will not destroy qualified privilege if the defendant was under a legal duty to make the communication. As their Honours noted, "a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even thought he or she knows or believes that the statement is false and defamatory unless the officer falsified the information" (at para 76 per Gaudron, McHugh and Gummow JJ).

Crucially, the joint judgment rejected the authority of Justice Hunt in *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 and Justice Clarke in *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 102-103 that a defendant's lack of honest belief in the truth of a publication constitutes a separate basis for finding malice, independent of any improper motive (at para 78 per Gaudron, McHugh and Gummow JJ).

Their Honours emphasised that knowledge of falsity is not equivalent to malice, and that it is the motive or purpose of the publication and not the defendant's belief in the truth of the publication which determines whether a defence of qualified privilege is available.

The joint judgment also held that "mere lack of belief in the truth of the communication is not to be treated as if it was equivalent to knowledge of the falsity of the communication and therefore as almost conclusive proof of malice" (at para 87 per Gaudron, McHugh and Gummow JJ).

Their Honours further noted that malice is not proved merely because a person does not intend and therefore does not believe in a defamatory meaning found by the judge or jury (at para 89 per Gaudron, McHugh and Gummow JJ).

The joint judgment also considered that the burden of proof in relation to the negating of a presumption of honesty of belief on behalf of the defendant rests on the plaintiff (at para 97 per Gaudron, McHugh and Gummow JJ).

Justice Kirby generally agreed with the reasons of the joint judgment, so far as such principles applied to the context of malice at common law in circumstances attracting the protection of the constitutional freedom of political communication (at para 185 per Kirby J).

The *Lange* extended qualified privilege defence with respect to government and political matters

Despite six of the seven High Court justices finding that Roberts and Case could not seek to rely on the *Lange* "extended" qualified privilege defence, the High Court made some interesting observations on the interrelationship of the constitutional implication of freedom of communication on political matters (as expressed in *Lange*) with the common law rules relating to qualified privilege, and with respect to the *Lange* defence generally.

Gaudron, McHugh and Gummow JJ noted that the law of defamation by providing for damages for defamatory publications has a chilling effect on freedom of communication on political matters. Their Honours further noted that if, contrary to their view summarised above, the common law made a positive belief in the truth of electoral statements a condition of the defence of qualified privilege, such a rule would be inconsistent with the Constitution and would need to be developed to accord with the Constitution's requirements (at para 102 per Gaudron, McHugh and Gummow JJ).

The joint judgment noted that *Lange* dealt with publications to the general public by the general media concerning "government and political matters" and that it was not concerned with the type of publication in the present case (ie. statements to a more limited group of electors with respect to a State member of parliament seeking re-election). However, their Honours noted that such statements as were made in the present proceedings were "at the heart of the freedom of communication protected by the Constitution" (at para 73 per Gaudron, McHugh and Gummow JJ). As such the *Lange* defence would not appear to be restricted to only general publications to the general public – defendants who have published in a more restricted fashion can also avail themselves of the defence.

Justice Callinan repeated the observations which he made in the case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 in relation to *Lange*:

> *"With respect generally to the Lange defence I would adhere to the opinions I expressed in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd. It is unnecessary, however, for me to decide whether I am bound to, or should apply it, in this appeal for a number of reasons. But I would add this to what I said in Lenah. Freedom of speech is no more under threat today than it was when the Constitution was drafted. That*

situation owes nothing to Lange. It is a situation that has existed throughout at least the last 40 years. Indeed, if anything, the contrary is the case. This has explicitly recently been recognised in the United States and the United Kingdom by practitioners and academic observers of the art of journalism. Australia is not unique in this respect. The same trends are readily apparent here. The expression "chilling effect [upon political discourse]" is no more than a metaphor, and, like many metaphors, an extravagantly inaccurate one. And, if proof be needed of the undesirability of the importation, after more than 90 years, into the Constitution of an hitherto undetected judicial implication, this case provides it. It will take years, years of uncertainty and diverse opinion for the court to reach a settled view of the elements of the defence and the way in which it is to be applied. Lange certainly does not exhaustively define its impact on the law of defamation. I doubt whether any case, or series of cases will ever do so, and, as defamation is not a head of federal constitutional power, legislation can never be enacted to resolve the recurrent uncertainties to which it gives rise." (at para 285 per Callinan J).

Justice Kirby strongly rebutted Justice Callinan's criticisms of the *Lange* defence:

> *"In his reasons, Callinan J complains that the constitutional implication, detected in the cases culminating in Lange, took more than 90 years to be perceived. That is true. But it is the nature of the elucidation of a written constitution. It took more than 50 years for the implication relating to judicial power to be detected in the Boilermakers' Case. It took nearly 100 years for the implication governing the independence of the State judiciary to be detected in Kable v Director of Public Prosecutions (NSW). Some implications, such as that of due process in judicial proceedings, are still in the course of evolution. Others have only just begun their journey to acceptance.*
>
> *If it takes years and diverse opinions in this court to throw light on the requirements of the constitutional implication of free speech, that is not a reason to reject the duty to state the law as it stands. Inconvenience has never been a reason for refusing to give effect to the Constitution. If it had been, the Bank Nationalisation Case, the Communist Party Case and the Cross-Vesting Case would have been differently decided. When the Constitution speaks, this court must give it effect. The fact that it causes some adjustments to the previous common law of qualified privilege or that it may take time to be fully elucidated is scarcely a reason for the court to stay its hand. In the eye of the Constitution, which speaks to centuries, that is neither here nor there." (at para 145 and 146 per Kirby J).*

Justice Kirby further considered the defence of "constitutional" qualified privilege found in *Lange* (his Honour considered that this issue could properly be raised by the parties before the High Court). His Honour considered that the requirement of reasonableness only arises when the constitutional defence is invoked to "protect a publication that would otherwise be held to have been made to *too wide an audience*" (para 161 per Kirby J, quoting *Lange* at 573). Justice Kirby noted that, because the trial judge, the Full Court and the parties agreed that the publications were not made to "too wide an audience" the *Lange* requirement of reasonableness did not arise in this appeal. Justice Kirby was clearly of the opinion that "the decision in *Lange* did not therefore establish a general requirement of reasonableness applicable to every situation of publication regarding governmental or political matters." (at para 162).

Implications of the decision

Roberts v Bass is a good reminder of the strength of traditional, pre-*Lange* qualified privilege in relation to elections. The Court was applying the old defence, rather than the extended *Lange* defence, which meant that it was not necessary to show that the publisher acted reasonably. It was important that the flyers were only distributed to voters in the relevant election. If the publication was in a mass media publication, such as a newspaper, in the lead up to an election, the traditional defence would probably not apply. It would probably be necessary to resort to the extended defence.

The High Court sensibly found that a plaintiff cannot defeat a defence of qualified privilege by showing only that the defendant did not have a positive belief in the truth of the imputations that arise from the publication. This is important because:

- sometimes a person will be passing on third party information in relation to which they have no belief as to truth or otherwise (for example, a person may report to the police that another person had told them that a third person had committed a crime, where the person reporting the information have no idea whether their informant was lying or not);
- sometimes (in New South Wales in particular, where imputations are the cause of action, not the matter complained of) the imputations found to be conveyed will be different from those which the publisher intended to convey. A plaintiff cannot now defeat a defence of qualified privilege by pleading imputations so as not to reflect the defendant's intentions, then interrogating to show the defendant did not believe those imputations to be true.

This decision by the High Court does not mean a person can publish things he or she knows to be false under the protection of qualified privilege. Evidence of knowledge of falsity or recklessness as to truth or falsity will normally be almost conclusive proof that the publication was malicious. A court will normally infer malice in such circumstances even if it is unclear what the improper, malicious, purpose is.

It seems evident that the High Court took a practical rather than an overly technical approach to the law of qualified privilege and malice, and by doing so, have confirmed that qualified privilege remains a robust defence of great utility for defendant's other than media organisations.

Unfortunately the manner in which the cases of the respective parties were conducted in the South Australian courts prevented any further development by the High Court of the "extended" *Lange* qualified privilege defence. However, as shown by the judgment of Justice Kirby in relation to the requirement (or otherwise) of reasonableness, and the criticisms raised by Justice Callinan, there may be scope for further development of that defence.

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