

Cush v Dillon: A Boost for the Defamation Defence of Qualified Privilege in the Context of Inaccurate Communications

Sophie Dawson and Lucienne Cassidy examine the High Court decision in *Cush v Dillon* which confirms common law qualified privilege as an important defamation defence

In *Cush v Dillon*,¹ the High Court affirmed a decision by the NSW Court of Appeal confirming the strength of the common law qualified privilege defence in relation to inaccurate communications. This is important because many had doubted the strength of that defence after the High Court's decision in *Aktas v Westpac Banking Corporation Limited* [2010] HCA 25 (*Aktas*). The defence has an important role to play in protecting a plethora of day to day communications.

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The common law qualified privilege defence applies where a communication is made by a person with a duty or interest in making it to a person with a reciprocal duty or interest in receiving it. The defence can be destroyed if the person defamed can establish that the person who made the communication made it maliciously. Malice in this context means an improper purpose.

For a long time, the defence has been relied upon in a variety of contexts including, for example, in relation to employment references, employee management processes and reports of crimes, or suspected crimes, to law enforcement agencies.

The *Cush v Dillon* case concerns a communication made in a management context concerning allegations about the conduct of a board member and a manager. Appeals were brought by Ms Amanda Cush and Mr Leslie Boland, who alleged that they were defamed by Mrs Meryl Dillon. Ms Cush was the General Manager of the Border Rivers-Gwydir Catchment Management Authority (*CMA*) and Mrs Dillon and Mr Boland were both members of the CMA Board. Mrs Dillon held a meeting with the Chairperson of the CMA Board, Mr Croft, and it was at this meeting that the communication was made. At trial, the jury found that Mrs Dillon told Mr Croft that it was 'common knowledge among people in the CMA' that Ms Cush and Mr Boland were having an affair. The version of the conversation Mrs Dillon said she had with Mr Croft in relation to the affair was different to that found by the jury. Mrs Dillon gave evidence that at

the time the conversation occurred she considered that the veracity of the information she had been given about the alleged affair was questionable. She accepted for the purpose of the proceedings that Ms Cush and Mr Boland were not having an affair.

The jury found that the statement conveyed a number of defamatory imputations. In defence, Mrs Dillon pleaded that she had made the statement on an occasion of qualified privilege. However, the trial judge considered that any protection based on privilege was destroyed by malice. The finding of malice was made on the basis of a finding by him that she knew the statement to be untrue. He considered it unnecessary to consider whether the occasion actually gave rise to privilege.

The High Court unanimously upheld the decision by the New South Wales Court of Appeal overturning the primary judge's finding. In three separate sets of reasons, all judges agreed that the defence of qualified privilege was available to Mrs Dillon and that the statement had the prima facie protection of the qualified privilege defence.

The court considered that before determining whether there had been malice, it was first necessary to apply the test of qualified privilege to determine whether the person had a duty to make the statement and whether the recipient had a corresponding interest in receiving it. The question of whether Mrs Dillon had a duty to communicate the existence of a *rumour* of an affair was not in issue in the High Court because the parties agreed that such a duty arose. However, the court made clear its view that such a duty did exist. French CJ, Crennan and Kiefel JJ held that:

*'[T]he duty Mrs Dillon had in disclosing and the interest Mr Croft had in receiving the information concerning CMA staff-related matters, including the nature of the relationship between members of the Board and members of staff, gave rise to an occasion of privilege.'*²

In a joint judgment, French CJ, Crennan and Kiefel JJ described the requirement for reciprocity of duty and interest, as the '*hallmark of the common law defence of qualified privilege*',³ holding that it is to be '*tested by the connection of the statement to the subject*'.⁴ They noted that the duty arose in the case in light of three factors, namely

before determining whether there had been malice, it was first necessary to apply the test of qualified privilege

1 [2011] HCA 30.

2 Paragraph [23].

3 Paragraph [11].

4 Paragraph [19] citing *Adam v Ward* [1917] AC 309 at 320-321.

'the positions of Mr Croft and of Mrs Dillon within the CMA, the nature and importance of the matters conveyed and the relationship of the defamatory statement to those matters.'⁵

French CJ, Crennan and Kiefel JJ reinforced the public policy behind the defence:

*'The defence of qualified privilege is based upon notions of public policy, that freedom of communication may in some circumstances assume more importance than an individual's right to the protection of his or her reputation.'*⁶

French CJ, Crennan and Kiefel JJ upheld the finding by Bergin CJ in Eq in the Court of Appeal that there was sufficient reciprocity between Mrs Dillon's duty and Mr Croft's duty because the rumour of the affair was 'intrinsically intertwined with' the concerns Mrs Dillon raised about the nature of the relationship between members of the Board and staff members and how complaints about the grievance process were dealt with. To have allowed Mr Croft to remain ignorant of the existence of the rumour would have been in breach of Mrs Dillon's duty as Board member.⁷

The court considered the appellants' submission that, while the occasion of privilege to communicate the existence of the rumour arose, the words 'common knowledge' used by Mrs Dillon gave the rumour 'the quality of a known fact' and in this way took the statement outside the 'umbrella of the applicable privilege'. The court unanimously rejected this submission. French CJ, Crennan and Kiefel JJ held that:

*'It could not, in our view, then be suggested [by the appellants] that the communication of the fact of an affair was less relevant to the matters discussed than a rumour. The error inherent in the statement does not deny the privilege.'*⁸

Bell, Gummow and Hayne JJ also accepted that 'an inaccuracy in relation to the relevant subject matter will not necessarily render what was said irrelevant to the privileged occasion.'⁹ Heydon J reached the same conclusion in separate reasons.

This confirmation by the court of traditional, core qualified privilege principles is likely to provide some comfort to people concerned about the status of the defence after the High Court's decision in *Aktas*, in which a majority of the court (French CJ, Gummow and Hayne JJ, Heydon and Kiefel JJ dissenting) found that qualified privilege was not available where a bank had communicated a 'refer to drawer' notification to the payee of a cheque after making a mistake as to whether funds were available to meet it. This decision is also likely to provide comfort to employers, who routinely rely upon this defence in relation to communications about staff and management issues.

It is also significant that the court affirmed that it is necessary to determine whether an occasion of privilege exists *before* reaching any conclusion as to malice. French CJ, Crennan and Kiefel JJ held that before considering the issue of malice, an enquiry must be undertaken to determine the boundaries of the privilege; a statement that lies beyond those boundaries may then be capable of being malicious.¹⁰

French CJ, Crennan and Kiefel JJ stated the test for malice as 'the existence of an improper motive that causes the person to make the statement.' Their honours confirmed that 'lack of belief in the truth

of the statement, or even ill-will felt towards the person defamed' will not be sufficient to destroy privilege. Rather, they held that it is necessary to show evidence 'that the making of the statement was actuated by improper motive'. Ultimately, the court did not determine whether Mrs Dillon had been actuated by malice and ordered a new trial on that issue.¹¹

Their honours noted that:

*'Knowledge on the part of a defendant that a statement is untrue may be almost conclusive evidence of malice. This is because a person who knowingly publishes false and defamatory material will usually have an improper motive. A lack of belief in the statement may stand in a different category. But in neither event is there warrant for equating knowledge or lack of belief with actual malice.'*¹²

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Heydon J highlighted in his judgment that the defence of qualified privilege needs to be sufficiently robust to deal with differences between what the jury finds was said and what was in fact said. His Honour noted that the difference between what was found to have been said and what Mrs Dillon believed arose because the jury did not accept her version of the relevant conversation, and instead accepted a slightly different version. His Honour said that submissions by the plaintiff that the statement made was not sufficiently connected to the occasion of qualified privilege:

*'[...] do not give sufficient significance to the difficulties a witness may have in giving a recollection of a small part of a long conversation long after the event, coupled with the possibility that a jury may choose for itself one among a number of available versions of the conversation. An account of why something – whatever precisely it was – was said may satisfy the two conditions for qualified privilege under discussion even though what the witness says was said does not correspond with what the trier of fact finds was said.'*¹³

There will now be a new trial dealing with the issue of whether or not the plaintiff can establish malice.

This judgment affirms the strength of common law qualified privilege in an employment context. It also confirms that the defence is sufficiently robust to apply in relation to inaccurate communications so long as they are relevant to the occasion of privilege and so long as there is no malice.

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5 Paragraph [13].

6 Paragraph [12].

7 Paragraph [16].

8 Paragraph [23].

9 Paragraph [52].

10 Paragraph [15].

11 Paragraphs [28] to [30].

12 Paragraph [29].

13 Paragraph [59].