06/02; [2002] VSC 174

SUPREME COURT OF VICTORIA

POPOVIC v HERALD & WEEKLY TIMES LTD & BOLT

Bongiorno J

10-12, 15-19, 22-24, 26 April, 3, 6-7, 21 May 2002

CIVIL PROCEEDINGS – TORTS – DEFAMATION OF MAGISTRATE – QUALIFIED PRIVILEGE – FREEDOM OF COMMUNICATION – DISCUSSION OF GOVERNMENT AND POLITICAL MATTERS – WHETHER DISCUSSION ABOUT REMOVAL OF MAGISTRATE WOULD BE PROPERLY CHARACTERISED AS BEING DISCUSSION OF A GOVERNMENT OR POLITICAL MATTER – WHETHER IT WAS REASONABLE FOR THE ARTICLE TO BE PUBLISHED – PLAINTIFF GIVEN NO OPPORTUNITY TO RESPOND – NOT IMPRACTICABLE OR UNNECESSARY TO CONTACT PLAINTIFF – COMPENSATORY AND EXEMPLARY DAMAGES CONSIDERED – MODE OF ASSESSMENT OF DAMAGES – WHETHER APPROPRIATE TO AWARD DAMAGES AND INTEREST.

P., a deputy chief magistrate, sued the defendants as the publisher and author of an article which appeared in the *Herald Sun* newspaper alleging that the article was defamatory of her both personally and in her office as a magistrate. The article discussed the conduct of P. in critical terms and detailed a number of instances (eg "hugging" drug traffickers) in which she was accused of having acted either illegally, improperly or at least inappropriately. It discussed her behaviour as not upholding the law and asserted that judicial officers who do not uphold the law ought to be removed. The defendants denied that the article was libellous and in the alternative they sought to justify it. They also claimed that it was a fair report of a judicial proceeding and was thus published on an occasion of qualified privilege at common law. Also, they alleged that the article was fair comment upon a matter of public interest and/or was published reasonably in the course of discussing government and political matters (the extended qualified privilege, commonly referred to as the *Lange* qualified privilege).

At the hearing, the trial judge ruled that the defences should be considered by the jury and that the parties have leave to move for judgment notwithstanding the verdict of the jury. That is, the jury's verdict would be taken upon a number of assumptions, the validity of which were still to be tested and ruled upon. The jury found that P. was libelled by the article, that the article was not true, that it was not a faithful and accurate report of judicial proceedings and that it was not fair comment on a matter of public interest. However, they considered that it was reasonable for the defendants to have published the article in terms of the *Lange* extended qualified privilege and that they so published it without malice. Following the jury's verdict, both parties moved for judgment: the defendants in accordance with it, P. notwithstanding it. Soon after, in a newspaper article and in radio and television broadcasts, Mr Bolt made statements concerning the case before it was finished. These included that the jury's verdict was a "victory for free speech", that P. was going to "challenge" the jury's verdict and that "you can defame someone … if you do it accurately and with the right motives."

HELD: Judgment for P. in the sum of $210,000 total compensatory damages plus $25,000 for exemplary or punitive damages, $11,500 by way of interest with costs.

1. Under traditional common law principles, reciprocity of interest or duty is required to found a claim of qualified privilege in answer to a defamation. Only exceptionally will such privilege be able to be established where defamatory matter has been published. The doctrine of government by representatives gives rise to an implication that the law must recognise freedom of communication and discussion about matters relating to the government of the Commonwealth. The question is whether there is a clear nexus between the discussion in the published article and the concepts of representative government.

***Adam v Ward* [1917] AC 309; [1916-17] All ER 157; 86 LJKB 849;**

***Nationwide News Pty Ltd v Wills* [1992] HCA 46; 177 CLR 1; (1992) 108 ALR 681; 66 ALJR 652; (1992) 44 IR 282, applied.**

2. Discussion concerning what might be called the ordinary working of courts including discussion critical of judicial decisions and judicial officers does not constitute ordinarily, discussion of government or political matters so as to give rise to an occasion of qualified privilege. However, the provision which exists for the removal of a judicial officer by formal act of the executive and the decision to so act is a "government or political" decision taken by an elected representative or a Minister responsible to Parliament. It follows that a discussion as to whether the executive government or a member of the legislature should or should not initiate the removal process in respect of any particular judge or magistrate is a discussion of government or political matters. Accordingly, as the article sued upon contemplated or advocated the removal of P. from her position as a magistrate,

then it would be properly characterised as being discussion of a government or political matter for the purpose of attracting the relevant qualified privilege.

***Lange v Herald and Weekly Times Ltd* [1997] HCA 25; (1997) 189 CLR 520; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2, applied.**

3. In carrying out the exercise of ensuring that the common law of defamation is reasonably appropriate and adapted to the protection of reputation and thus, not inconsistent with the constitutional freedom, the concept of reasonableness of conduct in publishing defamatory material imposes a condition upon those who seek the protection of the privilege. The onus of proof of reasonableness is on the defendants, who must satisfy the tribunal of fact that publication of the article was, in all the circumstances, reasonable. As a general rule, a defendant seeking the protection of the extended qualified privilege must prove he or she had reasonable grounds for believing that the defamatory imputation was true and did not believe it to be untrue. Having regard to the evidence given by Mr Bolt, it was clear that he did not care whether the article conveyed the defamatory imputation or not. There was no evidence either that he believed the imputation to be true or that he did not believe it was false. Accordingly, Mr Bolt's case of reasonableness failed and further there was no evidence upon which the jury could find that it was reasonable for him to publish it.

4. Another matter relative to the question of reasonableness is that a defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed. There was no evidence to show that Mr Bolt approached P. to give her an opportunity to respond to the article nor was it not practicable for him to do so. Further, there was no evidence of any lack of necessity to give P. the opportunity to respond. Accordingly, no jury could determine the issues of impracticability and the lack of necessity to seek a response in favour of the defendants.

5. Compensatory damages are to be awarded because P. was injured in her reputation. Insofar as those damages are compensatory, they must operate both as vindication of P. to the public and as a consolation to her for the wrong done. The quantum of P's damages must be significantly influenced by the necessity to vindicate her reputation definitively. The conduct of the defendants after publication of the article sued upon (including the defences taken and the refusal to retract and apologise) entitled P. to aggravated compensatory damages. The total compensatory damages are fixed at $210,000. Exemplary damages have the twin objectives of punishing the defendant for wrongdoing and deterring others from such conduct. In relation to P.'s claim for exemplary damages, a relevant factor was the defendants' post-verdict conduct in which Mr Bolt asserted, in effect, that he won the case subject only to a challenge by P. and that the jury's verdict was a "victory for free speech". Such conduct could be characterised as being in contumelious disregard of P's right to be not further damaged by the original libel and to have the public vindication of any ultimate judgment in her favour unobscured by such misleading remarks. The amount of $25,000 is fixed for exemplary or punitive damages. The sum of $11,500 is awarded by way of interest.

BONGIORNO J:

The Trial and the Verdict

1. The plaintiff in this proceeding is a deputy chief magistrate of the Magistrates' Court of Victoria. She sues the defendants as the publisher and author respectively of an article which appeared in the *Herald Sun* newspaper on 13 December 2000, alleging that the article was defamatory of her both personally and in her office as a magistrate. The defendants, who were jointly represented, denied the article was libellous. In the alternative they sought to justify it. They also claimed that it was a fair report of a judicial proceeding and was thus published on an occasion of qualified privilege at common law and/or was a faithful and accurate report of judicial proceedings entitling them to the absolute protection of s4 *Wrongs Act* 1958. Finally they alleged that the article was fair comment upon a matter of public interest and/or was published reasonably in the course of discussing government and political matters; the extended qualified privilege, commonly referred to as *Lange* qualified privilege.

2. By way of reply the plaintiff denied the affirmative allegations made by the defendants in their defence and raised the issue of malice as defeating the defence of fair comment and the defences of qualified privilege.

3. The trial of the action commenced on 10 April 2002 and proceeded until the defendants closed their case on 18 April 2002. At that point Mr J Sher QC for the plaintiff submitted that none of the pleaded defences could be properly left to the jury on the ground of insufficiency of evidence in respect of each of them. He also submitted that the defence of justification should fail as a matter of law in that the defendants should be prevented from seeking to justify their

pleaded imputations having regard to the principle in *David Syme & Co Ltd v Hore-Lacy*[1] and that the *Lange* qualified privilege defence should fail as a matter of law because the article sued upon was not published on an occasion of qualified privilege in that it was not a discussion of government or political matters as that concept was discussed in *Lange v Australian Broadcasting Corporation*[2].

4. Although Mr Sher submitted that none of the defendants' defences was efficacious he said that each of them should be put to the jury to be determined on the evidence (or lack of it as Mr Sher asserted) with the Court reserving to the plaintiff leave to move *non obstante veredicto* in the event that one or more of them was accepted by the jury. Mr Houghton QC for the defendants opposed this procedure. After argument, I ruled that the defences should be considered by the jury and that the parties generally should have leave to move *non obstante veredicto* should any of them so wish, after verdict.

5. The parties agreed on a set of questions to go to the jury raising the issues remaining on the pleadings; the defendants having abandoned reliance upon the common law qualified privilege attaching to a fair report of a judicial proceeding in favour of relying solely upon the statutory immunity from suit which attaches to a faithful and accurate report of judicial proceedings by virtue of s4 *Wrongs Act* 1958. In fact the questions left to the jury were amended, by consent, during the course of addresses but nothing turns on this amendment now.

6. The questions which the jury considered and its answers were as follows:-

> "1. Was the article defamatory of the plaintiff? Yes
>
> 2. If yes to 1, was the article true? No
>
> 3. If yes to 1, was the article a faithful and accurate report of the proceeding before the Magistrates' Court at Melbourne on 30 November 2000? No
>
> 4. If yes to 1, was the article fair comment on a matter of public interest? No
>
> 5. If yes to 1, was the conduct of the defendants in publishing the article reasonable in the circumstances? Yes
>
> 6. If yes to either 4 or 5, were the defendants actuated by malice in publishing the article? No"

7. Questions 7 and 8 concerning damages did not require answers. Thus, the jury found that the plaintiff was libelled by the article, that the article was not true, that it was not a faithful and accurate report of judicial proceedings and that it was not fair comment on a matter of public interest. However it considered that it was reasonable for the defendants to have published the article in terms of the *Lange* extended qualified privilege and that they so published it without malice.

8. In light of its verdict the jury did not proceed to assess damages although Mr Houghton had earlier submitted that it should be asked to do so regardless of its answers to earlier questions. This application was opposed by Mr Sher and I declined to grant it; principally because to have required the jury to answer a question as to damages would have required me to embark upon an explanation to it of the procedure which had been adopted whereby the jury would consider issues which may, after the event, be notionally withdrawn from their consideration upon a motion for judgment *non obstante veredicto*. I considered the case to be complicated enough already without risking confusion on the jury's part by asking them to assess damages notwithstanding that they might have already found against the plaintiff and in favour of the defendant, either in respect of the question whether the article was defamatory of her or in respect of one or more of the defendants' affirmative defences. Further, any assessment of damages made by a jury after finding for the defendant would be tainted in that it would be affected by the jury having found certain issues in the defendant's favour, when, on a proper analysis, those issues might not have been properly left for their consideration. The question of how damages would be assessed in the event that the jury did not do so and they ultimately needed to be assessed was left for consideration upon any motion for judgment *non obstante veredicto*. In the event, it was addressed by both counsel on these motions.

9. Following the jury's verdict both counsel moved for judgment; Mr Houghton in accordance with it and Mr Sher notwithstanding it. These motions for judgment require consideration of the *Lange* qualified privilege defence only, both as to its applicability to the occasion upon which the article was published and as to whether there was evidence sufficient to be left to the jury for it to determine the second part of the defence, that is to say whether the conduct of the defendants in publishing the article was reasonable, as that phrase was used by the High Court in *Lange*.

10. I heard argument on each of the above questions, and the consequential question as to how the plaintiff's damages should be assessed in the event that she was ultimately successful, on 3, 6 and 7 May 2002. I turn then to consider those questions and, if necessary, the consequent question of procedure. *[After considering the question of whether notice should be given under s78B of the* Judiciary Act *1903 (Cth), His Honour continued] …*

Qualified Privilege and Freedom of Political Discussion

13. Under traditional common law principles reciprocity of interest or duty is required to found a claim of qualified privilege in answer to a defamation[4]. Only exceptionally will such privilege be able to be established where defamatory matter has been published to the general public, such as in a daily newspaper, although *Adam v Ward* itself was one such case. There, a letter recording that the British Army Council had acquitted a general of misconduct charges levelled against him by the plaintiff, who was a member of Parliament, was held to have been published on an occasion of qualified privilege notwithstanding its wide publication in the press. The House of Lords held that the general public had a sufficient interest in the contents of the letter by reason of its subject matter to make the occasion one of qualified privilege.

14. In *Stephens v West Australian Newspapers Ltd*[5] McHugh J[6] pointed out that the proprietor of a newspaper is entitled to a defence of qualified privilege when it publishes statements made by a third person pursuant to or in discharge of that person's interest or duty to inform the general public about a matter. Further, that privilege will not be lost simply because the communication is read by persons having no legitimate interest in receiving it. If publication by mass media is the only reasonable mode of communicating with the public, qualified privilege will not be lost because the defamatory material is read, seen or heard by persons who have no legitimate interest in receiving it. However, as His Honour pointed out:-

> "Although, as the foregoing account of the case law demonstrates, the common law has upheld defences of qualified privilege for publications to the world at large, common law courts have taken a restricted view of the occasions when a person has an interest or duty to publish material to the general public. Protection of reputation has generally been preferred to the right of the public to know[7]."

15. In *Nationwide News Pty Ltd v Wills*[8] Deane and Toohey JJ held that the doctrine of representative government enshrined in the *Australian Constitution* (particularly, but not exclusively, ss7 and 24), that is to say the doctrine of government by representatives directly or indirectly elected or appointed by and ultimately responsible to the people of the Commonwealth, gives rise to an implication that the law must recognise freedom of communication and discussion about matters relating to the government of the Commonwealth. Although referring to the importance of this freedom of communication in relation to discussions of the background, qualifications and policies of candidates for election, their Honours did not confine such freedom of discussion to that concerning elected representatives. They identified the central thesis of the doctrine they expounded as being:–

> "… that the powers of Government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of governmental power under the *Constitution* hold them as representatives of the people under a relationship, between representatives and represented, which is a continuing one. The doctrine presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf[9]."

16. Deane and Toohey JJ pointed out that the implication of freedom of communication operates at two levels. The first level of communication and discussion is between the represented and their representatives (amongst whom they include not only Parliament and its members but also

" ... other Commonwealth instrumentalities and institutions ..."). The second level at which their Honours considered the implication of freedom of communication and discussion operates is at the level of communication between the people of the Commonwealth. They explain this aspect of the implied freedom as being a freedom to communicate:-

> "... information, opinions and ideas about all aspects of the Government of the Commonwealth, including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves[10]."

Their Honours included the exercise of judicial power as being one of the subjects in respect of which the implied freedom operated. However, the Canadian case, which they referred to as an illustration of such implication, *In re Alberta Legislation Statutes*[11] does not refer to judicial power. The judgment of Duff CJ and Davis J[12] omits the judiciary from those topics which they identified as contemplated by the British North America Act as being the subject of free public discussion in Canada. They referred only to Parliament, the discharge by Ministers of the Crown of their responsibilities to Parliament, the discharge by members of Parliament of their duties to the electors and to the electors themselves in respect of their responsibility in the election of their representatives.

17. Although it was not necessary on the facts in *Wills* to extend the implied constitutional freedom of communication to which their Honours referred to State and local government as distinct from that of the Commonwealth, Deane and Toohey JJ, observed that it would be unrealistic to see the three levels of government as isolated from one another or as operating otherwise that in an overall national context. Thus they would extend the constitutional principle discussed "... to all political matters including matters relating to other levels of government within the national system which exists under the constitution."[13]

18. Although the Court was unanimous in *Wills* in holding that the legislative provision there impugned was invalid it was only Deane and Toohey JJ who did so on the ground that neither of the heads of legislative power conferred by s51 of the *Constitution* upon the Commonwealth Parliament relevant to the problem they were considering should be construed so as to override or derogate from the Constitution's implication of freedom of communication about matters relating to the government of the Commonwealth.

Theophanous

19. Neither *Nationwide News Pty Ltd v Wills* nor *Australian Capital Television Pty Ltd v The Commonwealth*[14], in which Deane and Toohey JJ again expounded the implied freedom of communication deriving from the nature of representative government, was a defamation case. However, *Theophanous v The Herald and Weekly Times Ltd*[15] was. In that case Mason CJ, Toohey and Gaudron JJ held that then existing State (Victoria) defamation law seriously inhibited freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of elected representatives to the Australian Parliament and thus was inconsistent with the requirements of the freedom of free communication implied in the Constitution. Their Honours held that the law of defamation, whether common law or statute law, must not infringe the implied freedom of communication, even if conformity with that freedom meant that plaintiffs would experience greater difficulty in protecting their reputations. They held that an appropriate balance could be struck between the requirements of the constitutional implication and the protection of individual reputation by requiring a defendant to establish that in the circumstances which prevailed it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate. They were unwilling to remove completely from a defendant all responsibility for the accuracy of what was published holding that the modified defence of qualified privilege in relation to government and political matters as expanded was sufficient to ensure that the law of defamation did not infringe the implied freedom.

20. The fourth member of the majority in *Theophanous*, however, Deane J was of the opinion that the effect of the constitutional implication was to preclude completely the application of State defamation laws to impose liability for damages upon a citizen for the publication of statements about the official conduct or suitability for office of a member of Parliament or other holder of high public office. His Honour expressed himself as being unable to accept that the freedom which

the constitutional implication protected is, at least in relation to statements about the official conduct or consequent suitability for office of holders of high government office, conditioned upon the ability of the citizen or other publisher to satisfy a court of matters such as absence of recklessness or reasonableness. He included parliamentarians, judges and other holders of high office amongst those persons entrusted with the powers of government in respect of whom the constitutional freedom operates. Indeed, he specifically included judges of the High Court. In including the judiciary, however, Deane J was not joined by the other majority judges to whose views he expressed agreement for the purpose of answering the questions posed for the Court in that case.

21. In seeking to give content to the concept of the constitutional freedom to discuss political matters, Mason CJ, Toohey and Gaudron JJ in *Theophanous*[16] stated that whilst the underlying purpose of the freedom is to ensure the efficient working of responsible democracy, the fact that it is not possible to fix a limit to the range of matters that may be relevant to debate in the Commonwealth Parliament is a relevant consideration when an attempt is made to define the limits of the freedom. They considered that decisions on a case by case basis should, in time, work out a satisfactory distinction between political discussion and other forms of expression so as to set an acceptable limit to the type of discussion which falls within the constitutional protection. In dealing with the case then being decided, which was a libel action brought by a serving member of federal Parliament against a newspaper and a correspondent to the paper critical of his views on immigration, they said:–

> "For present purposes, it is sufficient to say that 'political discussion' includes discussion of the conduct, policies or fitness for office of Government, political parties, public bodies, public offices and those seeking public office. The concept also includes the discussion of the political views and conduct of persons who are engaged in activities that have become the subject of political debate, eg trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view the concept is not exhausted by political publications and addresses which are calculated to influence choices. Barendt (*Freedom of Speech*, 1985, p152) states:
>
> > ' 'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.
>
> It was this idea which Mason CJ endeavoured to capture when, in *Australian Capital Television*, he referred to 'public affairs' as a subject protected by the freedom (1992) 177 CLR at 138-140)[17]."

22. In *Stephens v West Australian Newspapers Ltd*[18] the High Court, by the same majority as that which decided *Theophanous*, held that defences based on the freedom of communication implied in the Australian *Constitution* and the *Constitution Act* 1889 (WA) were good defences to a libel action brought by a State member of parliament against a newspaper which criticised an overseas trip by a group of members of the Upper House of the Western Australian Parliament; thus making it clear that the principles expounded in *Theophanous* applied equally to a discussion of political matters wholly or principally confined to State politics within a State.

Lange

23. *Lange v Herald and Weekly Times Ltd*[19], decided three years after *Theophanous* and *Stephens,* was a unanimous decision of the seven judges of the High Court. It commenced from the position that it was arguable that neither *Theophanous* nor *Stephens* contained a binding statement of constitutional principle for reasons which related to the form of the proceedings in those cases and the way in which the majority, although concurring in the result in each case, did not concur in the reasoning which led to that result. The Court considered that *Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the *Constitution* and that, at least by 1992, the constitutional implication of freedom of political discussion precluded an unqualified application in Australia of the English common law of defamation insofar as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience. It considered that the correctness of the defences pleaded in *Lange* should be examined as a matter of principle and not of authority.[20]

24. Mr Sher submitted that, having regard to the status of the decisions in *Theophanous* and *Stephens* and the statements of principle which are to be found in *Lange*, to which I will refer hereunder, this Court should not concern itself with either *Stephens* or *Theophanous* in

resolving the questions which arise on these motions for judgment. In support of that submission he pointed to a comment of Owen J (in which Pidgeon and Ipp JJ concurred) in the Full Court of Western Australia in *Nationwide News Pty Ltd v International Financing and Investment Pty Ltd*[21] to the effect that, by virtue of *Lange*, the defence of qualified privilege as it was formulated in *Theophanous* has been discarded.

25. Whilst it is true that the defence of qualified privilege insofar as it applies to political discussion is now to be found as expounded in *Lange* as Owen J makes clear, that is not to say that the jurisprudence in the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous* has been rendered totally irrelevant. Indeed in *Kruger v The Commonwealth*[22] Toohey J repeated the quotation from Barendt[23] quoted in that judgment as a non-exhaustive definition of "political speech". His Honour considered that nothing said in *Lange* diminished the scope of the implied constitutional freedom discussed in cases such as *Wills, Australian Capital Television Pty Ltd v The Commonwealth*[24], *Theophanous* or *Stephens.* He considered that *Lange* reinforced that freedom.

26. The Court in *Lange* (which was a New South Wales defamation case) whilst recognising that the protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good, nevertheless considered that were it not for the fact that in New South Wales there exists a statutory defence of qualified privilege conferred by s22 *Defamation Act* 1974 (NSW)[25] (co-existing with a defence of qualified privilege at common law) the law would impose an undue burden on the required freedom of communication under the *Constitution* because it would arguably provide no appropriate defence for a person who mistakenly but honestly published government or political matter of a defamatory nature to a large audience. The Court held that as far as the common law doctrine of qualified privilege as expounded in Australia was concerned it must now be seen as imposing an unreasonable restraint on that freedom of communication, especially communication concerning government and political matters, which "the common convenience and welfare of society"[26] now requires. Their Honours considered that the system of government prescribed by the *Constitution* would be impaired if a wider freedom for members of the public to give and to receive information concerning government and political matters was not recognised.

27. In terms of the traditional formulation of a defence of qualified privilege the High Court in *Lange* extended qualified privilege in the following terms.

> "Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently those categories now must be recognised as protecting a communication made to the public on a government or political matter."[27]

Their Honours went on to confirm that the extended category of qualified privilege to which they were referring was equally applicable to discussion of government or politics at State or Territory level whether or not that discussion bears on matters at the federal level.

28. The constitutional implication of freedom of communication about government and political matters is grounded in the nature of representative government. So much is clear from an examination of the cases to which I have referred. However, that freedom of communication is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the constitution. Until *Lange* was decided, *Stephens v West Australian Newspapers Ltd*[28] was probably authority for the implication of a similar freedom of communication arising out of State constitutional arrangements[29]. Now *Lange* itself makes it clear that the freedom of communication implied in the Australian constitution, at least insofar as it impinges on the common law defence of qualified privilege in defamation, extends to protect the discussion of government or politics at State or Territory (or even local government) level[30].

29. Thus, the question which must be asked is whether it is necessary for the effective operation of the system of representative and responsible government that there be freedom to discuss the sort of matters discussed in the article sued upon even if that discussion is otherwise defamatory

of a particular magistrate. Is there a clear nexus between the discussion in the article and the concepts of representative government?

***Lange* and Judicial Officers**

30. If the purpose of the implied freedom is to permit, or even encourage, discussion amongst electors in respect of those matters which might affect their decision to vote or take a particular position on any government or political question or issue it can easily be understood how it must apply to discussions involving the activities of the legislative and executive arms of government (including emanations of the executive such as government business enterprises and the like). Those arms are both intimately connected with the political process in a way that judicial officers and courts are not. Discussion of the conduct of a judge or magistrate, including discussion of the correctness or otherwise of his or her decisions, would ordinarily have no relevance to the formation of any view by an elector on any issue in respect of which the legislature or the executive was competent to act subject only, perhaps, to an exception for the discussion of conduct sufficiently grave to warrant consideration of the extraordinary step of removal from office. Discussion of the conduct of judges or magistrates save for the exception noted would appear to have no connection with the concept of representative government.

31. Neither Parliament nor the executive has any role to play in disciplining, admonishing or even giving advice to a judge or magistrate in respect of conduct falling short of that which would warrant removal. Parliamentary practice recognises this situation by prohibiting debate which reflects on the conduct of various holders of high office, including judges, other than on a substantive motion which allows for a distinct decision of the House concerned[31]. This must be so to ensure the independence of the judiciary so that it can perform its functions free of fear or favour. The corrective for judicial error is the appeal process and the brake on judicial excess is the requirement that judicial power routinely be exercised in public so as to be subject to public and press scrutiny and, in appropriate cases, criticism[32]. When the mass media engages in such criticism it is protected in respect of defamatory statements not only by the ordinary defences applicable in all such cases but also by an absolute statutory immunity in respect of faithful and accurate reports of proceedings[33].

32. In *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*[34] the New South Wales Court of Appeal considered the validity of state statutory provisions which required it to sit *in camera* when hearing argument on questions of law arising out of failed prosecutions for contempt of court submitted to it by the State Attorney General. In considering the application of the principles of constitutional freedom of communication as expounded in *Lange* to the requirement that the court sit *in camera* in the proceedings described, Spigelman CJ (Priestley JA concurring; Meagher JA dissenting) dealt with an argument that judges and courts are within the sphere of public officials and bodies about whom the freedom of communication referred to could be exercised. He said[35]:-

> "First, the claimant suggested that judges and courts are within the sphere of public officials and bodies about whom the freedom could be exercised. Mr Rares SC, who appeared for the claimant, submitted that the conduct of the judiciary was itself a legitimate matter of public interest. He referred to *R v Nicholls* [1911] HCA 22; (1911) 12 CLR 280; 17 ALR 309. (To similar effect are the references to judges by Deane J in *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104 at 179, 180, 182; 124 ALR 1; (1994) 68 ALJR 713; [1994] Aust Torts Reports 81-297; 34 ALD 1). Counsel also relied on certain observations of McHugh J in *Stephens v West Australian Newspapers Ltd* [1994] HCA 45; (1994) 182 CLR 211 at 264; 124 ALR 80; 68 ALJR 765; [1994] Aust Torts Reports 81-298 (which were quoted with approval in the joint judgment in *Lange* at CLR 570-1; ALR 115).
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> > 'In the last decade of the twentieth century, the quality to life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers are of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials.'
>
> This passage, both as originally delivered and as approved in *Lange*, is concerned with the scope of

> qualified privilege for the purposes of the law of defamation. The inclusion of courts and judges in the scope of the subject matter with respect to which the public as a whole can be identified to have an interest, for purposes of applying the traditional rules of reciprocity in the context of qualified privilege for a defamatory statement, is not coextensive with the constitutional protection of freedom of communication. That protection, as *Lange* made clear, is an implication to be derived from the text and structure of the *Constitution* in so far as it makes provision for representative government. The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based. There are references in *Lange* itself, and in earlier authorities, to the possibility of amendment of the *Constitution* at a referendum. Although the submission was not made in these terms, it is possible to conceive of a referendum concerned with amending Ch III of the *Constitution* in relevant respects. In my view any such link between freedom of communication and the judiciary is altogether too tenuous. The formulation "governmental or political matters" is intended to confine the scope of the constitutional freedom. In theory, any subject matter may be the subject of a constitutional amendment. Section 128 is one of the provisions upon which the implied restriction has been based. It has not been suggested that it may operate on its own. To do so would lead to the conclusion that there was virtually no subject that was not of a 'governmental or political' character. This was not, as I understand it, the intention of the High Court in *Lange*."[36]

33. Although the Chief Justice was not considering the *Lange* principle in the context of common law qualified privilege it follows from that conclusion that discussion concerning what might be called the ordinary working of courts including discussion critical of judicial decisions and judicial officers does not constitute, ordinarily, discussion of government or political matters so as to give rise to an occasion of qualified privilege. There needs to be some nexus between the discussion and the concept of representative government as it operates in this country for the extended privilege to be applicable.

34. I turn then to consider the case of discussion which contemplates or advocates the dismissal of a magistrate or judge from his or her office.

35. Judicial officers enjoy security of tenure as the principal means of ensuring their independence. This independence is essential. It serves a constitutional purpose. It exists, not for the benefit of the individual judge or magistrate, but to maintain public confidence that disputes determined by judges and magistrates will be decided without there being any danger that the judicial officer will be influenced, or even suspected of being influenced, by fear for his or her judicial position from the executive government. This is, of course, particularly important when one or other part of the executive government such as police, government departments or Ministers of the Crown themselves are parties to the litigation before the judicial officer concerned, as they so often are.

36. It is a concomitant of judicial tenure that although provision exists for the removal of a judicial officer by a formal act of the executive, in extraordinary circumstances for proven misbehaviour or incapacity, such removal can occur, in the case of judges, both state and federal, only after a resolution of both houses of the relevant Parliament[37]. In the case of magistrates, in Victoria removal can be effected by the executive government but only after this Court has determined that the magistrate has been guilty of criminal behaviour or serious impropriety or is incapable, incompetent or neglectful of his or her duty[38].

37. Whilst the constitutional and statutory arrangements to which I have referred exist to protect the body politic from judges or magistrates who are unfit for office, the safeguards which surround the exercise of the removal power guarantee that it will be resorted to only in extraordinary circumstances. The very few occasions historically in which action has been taken to remove judges or magistrates and the even fewer occasions upon which such action has resulted in a judicial or magisterial commission being terminated demonstrate the seriousness with which the law guards the independence of judicial officers, not for their benefit, but so that those who come before them can have confidence that there is no possibility of political pressure being applied to decide a case in any particular way.

38. Notwithstanding the legal restraints on the exercise of the removal power, on those occasions on which action is taken for removal it must be taken, in the first instance at least, by a member of the executive government or, in the case of judges, a member of the legislature (who may also be a member of the executive). The decision to so act is a "government or political" decision. It is a decision taken by an elected representative or a Minister responsible to Parliament. It follows

that a discussion as to whether the executive government or a member of the legislature should or should not initiate the removal process in respect of any particular judge or magistrate is a discussion of government or political matters. As McHugh J said in *Stephens*[39] (in a passage which was quoted by the Court in *Lange*) after referring to functions and powers vested in public representatives and officials:-

> "How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials."

39. Insofar as a discussion which contemplates or agitates for the removal of a judge or magistrate is a discussion of government or political matters, it is so characterised not because it relates to the performance of the judge or magistrate. He or she is not a public representative or official as McHugh J used the term. The public representative or official in this instance is the member of the executive government or perhaps the member of Parliament who might or might not initiate the removal process. It is their functions and powers that are relevant in the sense meant by McHugh J not those of the judicial officer.

40. A similar argument concerning the function of the State Attorney General in exercising functions under the impugned statute in *John Fairfax Pty Ltd v A-G(NSW)*[40] to which I have referred was rejected by Spigelman CJ[41]. His Honour considered that nothing in *Lange* or any of the other authorities on the constitutional immunity suggested that that immunity should extend to matters involving the responsibility of a State Minister to a State Parliament and of his or her accountability to a state electorate. But his Honour in that case was not dealing with the common law defence of qualified privilege to defamation as extended by *Lange*. He was concerned with the validity of a statute. With respect to the question of qualified privilege the High Court in *Lange* said:-

> "It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the *Constitution* or cannot throw light on the administration of Federal Government. Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or Local level might bear on the choice that the people have to make in federal elections or in voting to amend the constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at Federal, State, Territory and local government levels the financial dependence of State, Territory and local governments on federal funding and policies and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable[42]."

41. Accordingly, I conclude that if the article sued upon in this case is in fact a discussion which contemplates or advocates the removal of the plaintiff from her position as a magistrate then it would be properly characterised as being a discussion of a government or political matter for the purpose of attracting the relevant qualified privilege. There is sufficient nexus between the discussion and the concept of representative government to protect such a discussion by the extended qualified privilege.

Characterisation of the Article

42. Whether allegedly defamatory material is published on an occasion of qualified privilege is a question of law[43]. That question of law extends, in a case such as the present, to the characterisation of the allegedly defamatory material. That characterisation must be of the article itself unrelated to any imputation alleged by the plaintiff (or the defendant) to arise from it. Of course, the exercise in characterisation must also be undertaken on the assumption that the article is defamatory but, disregarding the verdict of the jury in having found that issue and each issue raised by each of the defences pleaded by the defendants other than *Lange* qualified privilege in the plaintiff's favour.

43. The article discusses the conduct of the plaintiff in critical terms. It questions her fitness for office and details a number of instances in which she is accused of having acted either illegally, improperly or at least inappropriately. It discusses her behaviour as not upholding the law and asserts that judicial officers who do not uphold the law ought to be removed. It does this, in part, by enlisting the authority of the Chief Justice of Australia in purported support of the points which it makes.

44. In my opinion the article sued upon in this case advocates the removal of the plaintiff from office as a magistrate. As such it is properly characterised as a discussion of government or political matters in as much as it is only the executive government in the person of the Attorney General who can initiate the procedure under the relevant statutory provision which could result in the plaintiff's removal from office as a magistrate. It follows that, subject to the factual question of reasonableness to which I shall now turn, the publication by the defendants of the article sued upon was on an occasion of qualified privilege.

Reasonableness

45. The High Court in *Lange* extended the defence of qualified privilege so that the law of defamation would not offend the implied freedom of communication implied in the Constitution. In carrying out the exercise of ensuring that the common law of defamation was reasonably appropriate and adapted to the protection of reputation and thus, not inconsistent with the constitutional freedom, the Court imported the concept of reasonableness of conduct in publishing the defamatory material as imposing a condition upon those who would seek the protection of the privilege. Content to that concept was given by the Court in these terms[44]:-

> "Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except, in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond."

46. The onus of proof on the issue of reasonableness is, of course, on the defendants. They must satisfy the tribunal of fact that publication of the article was, in all the circumstances, reasonable having regard to the content of that concept as explained by the High Court in the above passage. Was the issue of reasonableness, which the jury found in the defendants' favour, properly left for its consideration such that its verdict on the question should stand, or should that verdict be not acted upon as having been not open to the jury on the facts of this case?

47. Mr Houghton relied upon *Naxakis v Western General Hospital*[45] as laying down the test to be applied when determining whether there is evidence such that an issue of fact should be left to the determination of a jury or withdrawn from their consideration. However the Court in that case was dealing with contested issues of fact whereas, in this case, as I understand Mr Sher's submissions, he says that on the basis of certain *uncontroverted* facts the issue of reasonableness should have been taken away from the jury. If Mr Sher is right in his submission that certain facts relevant to some aspects of this issue are indeed uncontroverted then the principle expressed by Starke J in *Shepherd v Felt & Textiles of Australia Ltd*[46] is probably more apt to describe the legal consequence contended for by Mr Sher than the decision in *Naxakis v Western General Hospital*. His Honour expressed the principle as follows:-

> "Where on the uncontroverted facts the action or an issue must be determined in favour of one party, then, as a matter of law, that party is entitled to the verdict in the action or upon the issue. And it is necessarily wrong to leave any conclusion or inference in such circumstances as a question of fact to the jury."

48. In *Lange* the High Court was concerned with the then law of defamation in New South Wales. That law, which included a defence of common law qualified privilege also provided a statutory defence of qualified privilege by virtue of s22 *Defamation Act* 1974, to which reference has already been made[47]. Reasonableness of conduct is the basic criterion in s22. Although the High Court judgment does not specifically import s22 into the concept of reasonableness as it applies to the extended qualified privilege, reasonableness of conduct for that purpose should be approached

in much the same way as the statutory defence provided by s22; modified, if necessary, by the passage quoted above in which the Court itself gave content to the concept of reasonableness.

49. Mr Houghton pointed to much evidence which, he submitted, demonstrated his clients' reasonableness in publishing the article. He referred to the joint majority judgment in *Theophanous* to the effect that whether a publisher has acted reasonably is a question of fact in every case and will depend upon the standards and expectations of the community as to whether the allegations needed to be investigated[48]. However, in this case, there are at least two issues, upon which the facts are not in dispute, which the defendants must establish in their favour to succeed on the issue of reasonableness. If they do not they must fail on this issue upon which they have the burden of proof.

The Defendants' State of Mind

50. The first issue relates to the defendants' state of mind with respect to the publication of the article and the defamatory imputations it conveyed.

51. *Lange* requires that, as a general rule, a defendant seeking the protection of the extended qualified privilege must prove that he had reasonable grounds for believing that the defamatory imputation was true and did not believe it to be untrue. The Court did not contemplate the situation of the defendant not intending to convey the particular defamatory meaning, which is Mr Bolt's assertion in this case. However, the cases on s22 *Defamation Act* 1974 (NSW) give some guidance in this regard. In *Morgan v John Fairfax & Sons Pty Ltd*[49] Hunt AJA (with whom Samuels and Mahoney JJA agreed) distilled a number of propositions on the question of reasonableness for the purposes of s22(1)(c) *Defamation Act* 1974 (NSW) from a number of decided cases. After emphasising that it is in respect of the defamatory imputation actually conveyed that the defendants' act of publication must be reasonable his Honour said:–

> "(3) If the defendant did not intend to convey any particular imputation in fact conveyed, he must establish:
> '(a) that … he believed in the truth of each imputation which he did intend to convey; and
>
> (b) that his conduct was never the less reasonable in the circumstances in relation to each imputation which he did not intend to convey but which was in fact conveyed.'[50]"

52. In order to determine whether there was any evidence before the jury upon which it could find this element of reasonableness was made out on the part of the defendants it is necessary to examine the evidence in the trial which went to the defendants' state of mind.

53. The first defendant tendered no evidence on this or any other issue in the trial other than the evidence of the second defendant, Mr Bolt. The failure of the first defendant to lead evidence as to the state of mind of its relevant executives might well be fatal to its case on the issue of reasonableness anyway, but, having regard to the conclusion which I have reached by reference to Mr Bolt's evidence, I shall assume that the corporate entity is able to adopt his state of mind; a proposition the correctness of which is not immediately apparent.

54. The second defendant Mr Bolt, swore answers to interrogatories in which he said that at the time of publication of the article he did not believe that the plaintiff had so misconducted herself in a criminal prosecution for arson that her removal from office was warranted and did not believe that on another occasion she had so misconducted herself when she hugged two drug traffickers that her removal from office was warranted. In his oral evidence Mr Bolt maintained that it was not his opinion that the plaintiff should be dismissed from office and that he did not believe that that was what the article meant. However, when asked whether, if he had inadvertently conveyed the intention that she ought to be dismissed he had made a serious mistake he answered: "No". The next question and answer were as follows:-

> "No; and if you've done it, you really ought to apologise and retract, shouldn't you? I'm not so sure about that, in the sense of this. If people gain the impression from what I'd written that they thought she should be sacked, then that's their point of view, they're entitled to it. And I won't apologise for them having that point of view."

55. Having regard to that uncontroverted evidence of Mr Bolt's state of mind it is clear that

he did not care whether the article conveyed the defamatory imputation or not. That is the only reasonable inference which can be drawn from his oral evidence. Accordingly, his case on this aspect of reasonableness fails; in that there is no evidence either that he believed the imputation to be true (he says he didn't) or that he did not believe it was false (he didn't know and didn't care). Further, if the concept of reasonableness in the extended qualified privilege imports the law applicable to the statutory defence under s22 *Defamation Act* 1974 (NSW) as expounded by Hunt AJA in *Morgan* then if Mr Bolt did not intend to convey the defamatory imputation (he said he didn't) in the circumstances there is no evidence upon which a jury could find that it was reasonable for him to publish it.

56. In dealing with those aspects of the content of the concept of reasonableness which related to the defendant's mental state; that is to say as to those aspects which concerned themselves with his state of mind as to the truth of the imputations conveyed, the High Court provided a minor qualification. It did not dictate that in every case the defendant had to have reasonable grounds for believing that the defamatory imputation was true and did not believe it to be untrue. It qualified the requirement by the words "... as a general rule". However, there was no evidence before the Court which would take this case out of the general category to which the High Court was referring. If the defendants sought to take this case out of the general category the onus would be upon them to produce the evidence to do so. They produced no such evidence.

57. It follows that there was no evidence on this aspect of the issue of reasonableness so as to enable that issue to be properly left to the jury. On this basis alone the defendants' claim of *Lange* qualified privilege must fail.

Failure to Seek a Response

58. The second matter which requires consideration relative to the question of reasonableness is the failure of the defendants to seek a response from the plaintiff before publishing the offending article.

59. The defendants do not assert that at any stage before publishing this article they sought any response from the plaintiff. Again, the first defendant called no evidence on the issue but the second defendant, Mr Bolt, gave oral evidence as follows:

> "Mr Houghton: You have told us about the researchers and inquiries you made before you wrote your article, did you take any step to contact Deputy Chief Magistrate Popovic before you wrote - before you published your article? Mr Bolt: No. Mr Houghton: Can you tell us why not? Mr Bolt: Two reasons basically. One, a magistrate's decision in open court must stand for itself, must speak for itself, and I quoted that — her comments at length. Secondly, there is a view by, as I understand, held by many judges and magistrates in all the time I have known, that you don't ask them to account for what they just did in court. You don't go behind the scenes and say 'Hey, why did you do that?' And I actually happen to believe that that is not proper, I agree with that point of view. I would have thought it was improper to do that."

60. The requirement which the High Court put upon a person publishing defamatory material who sought the extended qualified privilege to seek a response from the person defamed is not qualified by words such as "as a general rule". The only exceptions to the requirement laid down by the Court are where it is not practicable to comply with it or it was unnecessary to give the plaintiff an opportunity to respond.

61. The requirement is not surprising. *Lange* qualified privilege permits defamatory material, even grossly defamatory material to be published about a plaintiff provided the publication is in the course of a discussion about government or political matters. That the person about whom the material is published be given an opportunity to confront that material and respond if he or she wishes is not a counsel of perfection. It is a necessary ingredient of the condition of reasonableness which the law places upon the privilege.

62. There is nothing in Mr Bolt's explanation as to why he did not approach Ms Popovic to give her an opportunity to respond to the article which he and the first defendant proposed publishing about her which goes to the issue of whether it was practicable for him to do so. He seeks to be excused from the requirement because of a perceived sensitivity to approaching a judicial officer before publishing material which may be defamatory. He does not attest to any impracticability. Accordingly, on this issue, a jury would not be entitled to find that such impracticability existed.

63. The other basis upon which the defendants could escape the requirement would be if they proved that it was unnecessary to give the plaintiff an opportunity to respond. Again, Mr Bolt's evidence that "a magistrate's decision in open court must stand for itself" provides no evidence of any lack of necessity to give the plaintiff the required opportunity. It might be different if the article contained a bare report of a court proceeding but, as Mr Bolt attested, this was an "opinion piece" containing his opinions. Those opinions were not any part of what happened in Court. A jury would not be entitled, on the basis of such an answer or upon any other part of Mr Bolt's evidence to form the view that it was, in this case, for some unexplained reason, unnecessary to give Ms Popovic the opportunity to respond which the law requires.

64. The burden of proof in respect of issues of impracticability and the lack of necessity to seek a response rests on the defendants. They have produced no evidence upon which a jury could determine either of those questions in their favour.

65. The arguments of counsel canvassed many other issues going to the question of the defendants' reasonableness in publishing the article sued upon. It is unnecessary, in the circumstances, for me to enter upon a more detailed analysis of this issue than I have already done. On the basis of that analysis I am satisfied that had this question been argued before this case was put to the jury the issue of *Lange* qualified privilege would have been withdrawn from their consideration on the ground that no evidence existed upon which a jury could properly find that the actions of the defendants in publishing the article sued upon were reasonable.

66. It follows from the above that the defendants motion for judgment should be dismissed. On the plaintiff's motion for judgment there will be judgment for the plaintiff for damages to be assessed.

Assessment of Damages

67. The remaining question is that of how this Court should now proceed to conclude this matter by assessing the plaintiff's damages.

68. Rule 51.01 of the Rules of Civil Procedure requires the assessment of damages under any judgment or order for damages to be assessed by a Master unless the Court otherwise orders. Accordingly, *prima facie*, the plaintiff's damages should now be assessed by a Master. The defendant would, of course, be entitled to take part in such assessment (Rule 51.02 (1)) and in most respects the assessment should be conducted as if it were a trial of the proceeding (Rule 51.03).

69. Mr Houghton, for the defendants, submits that the Court should now proceed to empanel another jury and have it assess the plaintiff's damages. Assuming, without deciding, that there would be power in the Court to proceed in that way there seems to me to be a number of reasons why such a course should not be followed.

70. The evidence in this trial ran for more than a week. I estimate that were an assessment of damages to be now undertaken by a jury more than half that evidence would have to be called again. Whilst the same situation may well obtain if the assessment of damages was conducted by a Master, were I to undertake the assessment it could be done on the basis of the evidence already given in the trial before me together with such other evidence as any party sought to lead and which was properly admissible on the damages issue. The hearing should be able to be disposed of in a day or slightly more – particularly if outlines of argument with appropriate transcript references are provided

71. Mr Houghton submitted that it was inherently undesirable for one judicial officer to sit in judgment over another and cited in support of that proposition the (dissenting) judgment of McHugh J in *Mann v O'Neill*[51]. However, this submission overlooks the fact that this Court not only exercises a continuous supervisory jurisdiction in respect of the Magistrates' Court but has a specific jurisdiction with respect to the question which was much agitated in this case, namely the fitness of a magistrate to continue to hold office.[52]

72. Rules 1.14 and 1.15 of the Rules of Civil Procedure require the Court to endeavour to ensure that all questions in proceedings before it are effectively, completely, promptly and economically determined and confer ample power upon the Court to give appropriate directions to ensure that

its procedure is efficacious for the purpose of properly determining the issues between the parties before it. Rule 1.14, in particular, would appear to require that the Court look carefully at issues of cost and convenience when exercising powers under the Rules.

73. In my opinion it is inappropriate that this matter should now proceed before a newly empanelled jury for the reasons I have stated. Accordingly, I propose to exercise the discretion conferred by the Rules to proceed to conclude this case by assessing the damages to which I have determined the plaintiff is entitled. Even if the defendant had, at this point, some right to a jury, which I doubt, I would be entitled to proceed in the way in which I have indicated notwithstanding that entitlement[53].

74. Similarly, to apply Rule 51.01 so as to require the assessment of the plaintiff's damages to be undertaken by a Master would have similar (if lesser) cost and convenience problems. Such a procedure would be likewise inappropriate.

75. The plaintiff's damages will, accordingly, be assessed by me on a date to be fixed.

Orders

76. Accordingly I propose the following orders in this case:–

1. The defendants' motion for judgment is dismissed.

2. On the plaintiff's motion for judgment there will be judgment for the plaintiff for damages to be assessed.

3. The plaintiff's damages will be assessed by the Honourable Justice Bongiorno on a date to be fixed and in accordance with directions to be given after hearing counsel for all parties.

4. The costs of the proceeding to date will be reserved.

77. I shall hear counsel further on the form of the orders and as to any directions sought in respect of the assessment of damages.

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[1] [2000] VSCA 24; (2000) 1 VR 667; [2000] A Def R 53-055.
[2] [1997] HCA 25; (1997) 189 CLR 520; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2.
[3] In R*e an Application by the Public Service Association of New South Wales* [1947] HCA 31; (1947) 75 CLR 430; *Green v Jones & Anor* [1979] 2 NSWLR 812; *Narain v Parnell* (1986) 9 FCR 479; (1986) 64 ALR 561; 20 A Crim R 417.
[4] *Adam v Ward* [1917] AC 309; [1916-17] All ER 157; 86 LJKB 849.
[5] [1994] HCA 45; (1994) 182 CLR 211; 124 ALR 80; 68 ALJR 765; [1994] Aust Torts Reports 81-298.
[6] at 263.
[7] [1994] HCA 45 (1994) 182 CLR 211 at 263-4; 124 ALR 80; 68 ALJR 765; [1994] Aust Torts Reports 81-298.
[8] [1992] HCA 46; (1992) 177 CLR 1; (1992) 108 ALR 681; 66 ALJR 652; (1992) 44 IR 282.
[9] ibid at 72.
[10] [1992] HCA 46; (1992) 177 CLR 1 at 74; (1992) 108 ALR 681; 66 ALJR 652; (1992) 44 IR 282.
[11] [1939] AC 117; [1938] SCR 100; (1938) 2 DLR 81.
[12] at 132-133.
[13] [1992] HCA 46; (1992) 177 CLR 1 at 75; (1992) 108 ALR 681; 66 ALJR 652; (1992) 44 IR 282.
[14] [1992] HCA 45; (1992) 177 CLR 106; (1992) 108 ALR 577; (1992) 66 ALJR 695.
[15] (1994) 182 CLR 104.
[16] at 123 *et seq.*
[17] (1994) 182 CLR 104 at 124.
[18] (1994) 182 CLR 211.
[19] (1997) 189 CLR 520.
[20] (1997) 189 CLR 520 at 556.
[21] [1999] WASCA 95.
[22] [1997] HCA 27; (1997) 190 CLR 1 at 72; (1997) 146 ALR 126; (1997) 71 ALJR 991; (1997) 13 Leg Rep 2.
[23] *supra* para 21.
[24] [1992] HCA 45; (1992) 177 CLR 106; (1992) 108 ALR 577; (1992) 66 ALJR 695.
[25] s22 *Defamation Act* 1974 (NSW) states:–
"22. (1) Where, in respect of matter published to any person:
(a) the recipient has an interest or apparent interest in having information on some subject; (b) the matter is published to the recipient in the course of giving to him information on that subject; and (c) the conduct

of the publisher in publishing that matter is reasonable in the circumstances, there is a defence of qualified privilege for the publication."
[26] *Toogood v Spyring* [1834] EngR 363; (1834) 1 Cr M & R 181 at 193; 149 ER 1044 at 1050.
[27] [1997] HCA 25; (1997) 189 CLR 520 at 571; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2.
[28] [1994] HCA 45; (1994) 182 CLR 211; 124 ALR 80; 68 ALJR 765; [1994] Aust Torts Reports 81-298.
[29] but see *Lange* at 556.
[30] ibid at 571-572.
[31] Erskine May, *Parliamentary Practice* (1997, 22nd Ed) pp333, 385-6.
[32] *Scott v Scott* [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520; *Dickason v Dickason* [1913] HCA 77; 17 CLR 50 at 54; 19 ALR 400.
[33] s4 *Wrongs Act* 1958 (Vic).
[34] [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694.
[35] at 709.
[36] [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694 at 709-710.
[37] s72 *Australian Constitution*; s77(1) *Constitution Act* 1975 (Vic); s9(1) *County Court Act* 1958 (Vic) and similar provisions in other States.
[38] s11 *Magistrates' Court Act* 1989 (Vic).
[39] [1994] HCA 45; (1994) 182 CLR 211 at 264; 124 ALR 80; 68 ALJR 765; [1994] Aust Torts Reports 81-298.
[40] [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694.
[41] ibid at 710-711.
[42] [1997] HCA 25; (1997) 189 CLR 520 at 571; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2.
[43] *Hebditch v MacIlwaine* [1894] 2 QB 54; *Adam v Ward* [1917] AC 309 at 318; [1916-17] All ER 157; 86 LJKB 849.
[44] at 295.
[45] [1999] HCA 22; (1999) 197 CLR 269; (1999) 162 ALR 540; (1999) 9 Leg Rep.
[46] [1931] HCA 21; (1931) 45 CLR 359 at 373; 37 ALR 194.
[47] para 26.
[48] [1994] HCA 46; (1994) 182 CLR 104 at 138; (1994) 124 ALR 1; (1994) 68 ALJR 713; [1994] Aust Torts Reports 81-297; 34 ALD 1.
[49] (1991) 23 NSWLR 374; [1991] Aust Torts Reports 81-115. The decision in this case was reversed by the Privy Council but this aspect of the Court of Appeal judgment was not criticised.
[50] (1991) 23 NSWLR 374 at 387; [1991] Aust Torts Reports 81-115.
[51] [1997] HCA 28; (1997) 191 CLR 204 at 217; (1997) 145 ALR 682; (1997) 71 ALJR 903; [1997] Aust Torts Reports 81-436; (1997) 12 Leg Rep 21.
[52] s11 *Magistrates' Court Act* 1989 (Vic).
[53] *Pezzimenti v Seamer & Ors* [1995] VicRp 42; [1995] 2 VR 32.

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