IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S319 of 2011**

BETWEEN **TONY PAPACONSTUNTINOS**

Appellant

AND

PETER HOLMES A COURT

Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet Publication

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. The case raises the correctness of two propositions:

   (a) Defamatory communications made by a defendant in defence of the defendant's personal interests will only be protected by the common law defence of qualified privilege where a reasonable person in the defendant's position would have thought that publication was necessary for the defence of those interests (***reasonable necessity test***).

   (b) In the case of a volunteered communication to defend interest, the defendant will ordinarily fail the reasonable necessity test ***unless there was a pressing need*** for the communication to be made.

Part III: Section 78B of *Judiciary Act 1903* (Cth)

3. The appellant considers that no notice pursuant to section 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Citation of decisions below

4. The decision of the Court of Appeal is reported at [2011] Aust Tort Reports ¶82-081. The medium neutral citation is [2011] NSWCA 59.

5. The trial judge's decision is not reported. The medium neutral citation is [2009] NSWSC 903.

Part V: Factual background

6. In August 2005 the respondent and Mr Russell Crowe put forward a proposal to inject $3 million into the South Sydney District Rugby League Football Club (***Souths***) in exchange for a controlling interest. The bid was to be put to the Souths' members' vote at an Extraordinary General Meeting to be held on Sunday, 19 March 2006.

7. At the time of the proposal, the appellant was one of the directors of South Sydney Leagues Club, a licensed club associated with Souths (***the Club***). He was a strong opponent of the proposed takeover of Souths. He was employed by the Construction, Forestry, Mining and Energy Union (***CFMEU***).

8. On Friday 17 March 2006, two days before the proposed Extraordinary General Meeting, the respondent sent a letter of complaint to Mr Andrew Ferguson, the State Secretary of the CFMEU by facsimile. The letter was copied to Mr Nicholas Pappas, a solicitor and former Chairman of Souths. The letter also came to the attention of the appellant's immediate supervisor at the CFMEU, Mr Brian Parker. The letter is set out in paragraph 27 of McColl JA's reasons for judgment. In the concluding sentence of the letter, the respondent asked Mr Ferguson to contact him that day.

9. At first instance, the trial judge (McCallum J) found that the letter was published to Messrs Ferguson, Pappas and Parker and conveyed three imputations which were defamatory. Those imputations were:

   (a) that the appellant, a board member of the Club, repeated information he knew to be misleading about the respondent's proposal to take a controlling interest in Souths;

   (b) that the appellant, a board member of the Club, was reasonably suspected by the respondent of corruptly arranging for funds meant for Souths to be channelled to himself; and

   (c) that the appellant, a board member of the Club, and an official of the CFMEU, was reasonably suspected by the respondent of corruptly channelling overpayments by Souths to the CFMEU.

10. Imputations (b) and (c) (referred to by McColl JA as the ***corruption allegations***) were related to the employment of the appellant's son, Mr Jamie Papaconstuntinos, by Souths

in an assistant coaching position between 2003 to 2004. The respondent had become aware of the matters concerning the appellant's son's employment at Souths during the due diligence process conducted as part of the takeover bid for Souths. The respondent was aware of those matters by at least December 2005, if not earlier in August or September 2005. The respondent learned of no new information about this matter from December 2005 to 17 March 2006, when he sent the letter to Mr Ferguson.

11. Upon receipt of the letter, Mr Ferguson tried to contact to the respondent, leaving a number of telephone messages, indicating they were urgent. Despite the final sentence of the respondent's letter, Mr Ferguson received no response from the respondent on 17 or 18 March 2006.[1] The respondent did not speak to Mr Ferguson about the letter until sometime during the week of 29 March 2006.

12. The respondent sought to establish two defences: common law qualified privilege and that the matter complained of was published in circumstances where the plaintiff was unlikely to suffer harm. Both defences failed. In relation to the defence of qualified privilege, the trial judge held that the defence did not apply in the circumstances but, in case this conclusion was wrong, found that malice was not made out.

13. Verdict and judgment for $25,000 was entered for the appellant. The respondent was ordered to pay the appellant's costs.

14. The Court of Appeal (Allsop P, Beazley, Giles, Tobias and McColl JJA) upheld the respondent's appeal on the existence of qualified privilege. McColl JA delivered the leading judgment, with which the other members of the Court agreed. Allsop P made some additional observations with which Beazley and Tobias JJA agreed.

Part VI: Argument

A. The reasoning in the courts below

15. At both first instance and before the Court of Appeal, the respondent's qualified privilege defence was based solely on the protection or furtherance (together, ***defence***) of the respondent's personal interests. The respondent never raised an issue of duty.

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[1] This is demonstrated by the following paragraph in a letter sent by Mr Ferguson to the respondent at some time after 18 March 2006: "In your correspondence you indicated that you would respectfully request to hear from me on Friday. I left numerous phone messages for you on Friday and left my phone on all weekend. I am available to meet you to discuss these issues further." The letter was demonstrably not finished until after the weekend although the date 17 March 2006 was not corrected.

16. At first instance, the trial judge held[2] (a conclusion endorsed by Allsop P)[3] that Mr Ferguson and Mr Parker had an interest in receiving the letter. However, the trial judge did not accept that the respondent had "an interest that justified his publishing information on [the misuse of funds suspected by the respondent] to Mr Ferguson at the time that he did".[4] Her Honour did not accept that publication of that material "was fairly warranted by any reasonable occasion or exigency"[5]:

    (a) There was no "pressing need" for the respondent to protect his interests by volunteering the defamatory information about the events surrounding the employment of the appellant's son in 2003 to 2004.[6]

    (b) Furthermore, the respondent had no reasonable basis for making the corruption allegations. The suggestion that the matters concerning the corruption allegations explained the appellant's opposition to the takeover bid was tenuous.[7]

    (c) Finally, the timing of the letter did not provide an opportunity for the facts in the letter to be checked.[8]

17. The Court of Appeal reversed the trial judge's conclusion concerning qualified privilege.

18. First, the Court held that the respondent had a legitimate interest in publishing the defamatory letter, described variously as the "real possibility or expectation" that publication would bring about the intervention of the applicant's superiors[9] or the "tangible interest in his takeover bid for Souths succeeding".[10]

19. Secondly, Allsop P held that the trial judge was wrong to conclude that the publication was not "fairly warranted".[11] McColl JA did not directly deal with this issue, but her Honour's conclusion (at [142]-[146]) is an implicit rejection of the trial judge's conclusion on this issue. The error identified was the trial judge's reliance on the requirement to establish "pressing need" in the case of volunteered communications,

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[2] [2009] NSWSC 903 at [62], [64] and [67].
[3] [2011] NSWCA 59 at [7].
[4] [2009] NSWSC 903 at [68].
[5] [2009] NSWSC 903 at [72].
[6] [2009] NSWSC 903 at [69].
[7] [2009] NSWSC 903 at [70].
[8] [2009] NSWSC 903 at [71].
[9] [2011] NSWCA 59 at [9].
[10] [2011] NSWCA 59 at [142].
[11] [2011] NSWCA 59 at [10]; see also [7].

sourced from the following statements of McHugh J in his dissenting judgment in *Bashford v Information Australia (Newsletters) Pty Ltd* (***Bashford***):

> Ordinarily the occasion for making a volunteered statement will be privileged only where there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient.[12]
>
> ...
>
> But where neither life is in immediate danger nor harm to the person or injury to property imminent, the fact that the defendant has volunteered defamatory matter is likely to be decisive against a finding of qualified privilege.[13]

10 20. McColl JA concluded that McHugh J's statements were unsupported by authority and did not reflect Australian law. Her Honour said that the existence of qualified privilege "turns on a close examination of all the circumstances of the publication".[14] McColl JA sought to explain previous decisions of the Court of Appeal which had endorsed McHugh J's statements.[15] Allsop P gave short supplementary reasons to the same effect, stating: "Pressing need is not a superadded precondition for qualified privilege, even if there be an interest in the publisher, if the publication is voluntary."[16]

B. Errors in the Court of Appeal's reasoning

21. The Court of Appeal was wrong to conclude that the trial judge had erred in the assessment of what was "fairly warranted by any reasonable occasion or exigency".

20 22. That error stemmed from:

(a) a misunderstanding of the expression "fairly warranted by any reasonable occasion or exigency"; and

(b) the failure to recognise that where the common law defence of qualified privilege is justified by reference to the defence of the defendant's personal interests, the defendant must establish that a reasonable person in the defendant's position would have thought that publication of the defamatory matter was necessary to defend those interests.

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[12] (2004) 218 CLR 366 at 393 [73].
[13] (2004) 218 CLR 366 at 395 [77].
[14] [2011] NSWCA 59 at [141].
[15] *Goyan v Motyka* [2008] NSWCA 28; *Bennette v Cohen* [2009] NSWCA 60.
[16] [2011] NSWCA 59 at [5].

C. *Toogood v Spyring*

23. The expression "fairly warranted by any reasonable occasion or exigency" is sourced from Parke B's classic judgment in *Toogood v Spyring*:[17]

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another ... and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, and affords a qualified defence depending upon the absence of actual malice. *If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.*

24. There is obvious danger in treating Parke B's statement as if it were a statutory pronouncement.[18] For one thing it is almost certain, given the passage which follows the one cited and the contemporary influences on Parke B's judgment,[19] that his Lordship was merely attempting to summarise, in typically compressed form, the common law as it stood at that time. For the purposes of this case it is sufficient to draw two points from *Toogood v Spyring* of continuing application.

25. *First,* common law qualified privilege cases can be conveniently divided into two broad classes: those where the communication is made "under a sense of duty" — whether legal, social or moral — and those where the communication is "made in the legitimate defence of a person's own interest".[20] The word "defence" encompasses conduct to protect or secure a present or expected interest from harm (i.e. protection or furtherance of interest). There is also now a third class involving communications made concerning government and political matters.[21] That category, however, is in a special class involving an extension or development of the common law to comport with the Constitution.

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[17] (1834) 1 CM & R 181 at 193; 149 ER 1044 at 1049-1050 (emphasis added), approved in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373 [9] per Gleeson CJ, Hayne and Heydon JJ.

[18] See *Aktas v Westpac Banking Corp* (2010) 241 CLR 79 at 88 [17]-[18] per French CJ, Gummow and Hayne JJ. For general observations on the need to avoid treating judgments as statutes see, e.g., *Mills v Mills* (1936) 60 CLR 150 at 169 per Rich J; *Benning v Wong* (1969) 122 CLR 249 at 299-300 per Windeyer J; *Brennan v Comcare* (1994) 50 FCR 555 at 572-573 per Gummow J (FC).

[19] See paragraph 45 below, referring to *Starkie on Libel and Slander* (2nd ed, 1830).

[20] The language is that of Lord Macnaghten (for the Board) in *Macintosh v Dun* (1908) 6 CLR 303 at 305-306 (PC).

[21] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

26. The cases recognise that the existence of a social, moral or ethical duty is a matter upon which judges may disagree.[22] In this sense, Griffith CJ was right to suggest that the existence of a moral or social duty may overlap with the existence of an interest.[23] *Coxhead v Richards*,[24] analysed in detail by McColl JA (at [117]ff), is the classic example of disagreement about the existence of a moral or social duty. In that case the defendant received information from the mate of a ship that the plaintiff, the captain, was a drunk and unfit for command. The defendant provided the information to the owner of the ship who dismissed the captain. The defendant did not know the owner and had no interest in the ship. The Court of Common Pleas was equally divided on whether the occasion was one of qualified privilege. That disagreement is best understood as turning on the judges' assessment of whether the defendant was under a moral or social duty to communicate the information to the captain.

27. However, the difficulty which is sometimes experienced of identifying a social, moral or ethical duty does not deny the undoubted distinction between communications made "under a sense of duty" and communications made in defence of a person's own interest.

28. *Secondly*, Parke B's reasons identify two limitations on communications which are privileged: they must be "fairly warranted by any reasonable occasion or exigency" (***the first limitation***) and they must be "honestly made" (***the second limitation***).

29. The second limitation is associated with what is usually described as actual or express malice.[25] Under this limitation, which concerns the defendant's *subjective* purpose, the privilege will be defeated if the communication is used for some purpose or motive foreign to the duty or interest which gives rise to the privilege.[26]

30. The first limitation is an *objective* one.[27] It has been approved in this Court on a number of occasions.[28] While fine parsing of the language of any decision can be dangerous, it is important to appreciate that it is not enough simply that the

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[22] See, e.g., *Whiteley v Adams* (1863) 15 CB (NS) 392 at 418 per Erle CJ; 143 ER 838 at 848; *Watt v Longsdon* [1930] 1 KB 130 at 145-146 per Scrutton LJ (CA), cited in *Guise v Kouvelis* (1947) 74 CLR 102 at 113-114 per Starke J.

[23] *Howe & McColough v Lees* (1910) 11 CLR 361 at 369 per Griffith CJ. See also *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 101 [68] per Heydon J (dissenting).

[24] (1846) 2 CB 569; 135 ER 1069. *Guise v Kouvelis* (1947) 74 CLR 102 is another example.

[25] *Aktas v Westpac Banking Corp* (2010) 241 CLR 79 at 88 [16]-[18] per French CJ, Gummow and Hayne JJ.

[26] As explained in *Roberts v Bass* (2002) 212 CLR 1.

[27] See *Cush v Dillon* (2011) 85 ALJR 865 at 871 [25] per French CJ, Crennan and Kiefel JJ.

[28] See, e.g., *Howe & McColough v Lees* (1910) 11 CLR 361 at 368 per Griffith CJ (Barton J agreeing), 377 per O'Connor J, 394 per Higgins J; *Guise v Kouvelis* (1947) 74 CLR 102 at 110 per Latham CJ (McTiernan and Williams JJ agreeing), 124 per Dixon J; *Cush v Dillon* (2011) 85 ALJR 865 at 870 [18] per French CJ, Crennan and Kiefel JJ. See also *Macintosh v Dun* (1908) 6 CLR 303 at 305 per Lord Macnaghten (for the Board) (PC).

communication is "fairly warranted", as Allsop P suggested.[29] "Fairly warranted" simply means "fairly justified". That raises the obvious question: justified by what? The answer given by Parke B is that the communication must be justified by a "reasonable occasion or exigency".

31. An exigency may be defined as circumstances requiring immediate, pressing or urgent action, an instance of "urgent want" or "pressing necessity", or that which is needed or required.[30] Although "occasion" can be used to mean merely circumstances[31] it can also be used to mean a "cause" i.e. circumstances "leading to some result ... [t]hat which produces an effect",[32] or "a juncture of circumstances requiring or calling for action; necessity or need arising from circumstances."[33] If "occasion" in Parke B's statement meant merely circumstances, his Lordship's reference to "exigency" would be entirely otiose. Read as a whole the better view is that Parke B was referring to communications in circumstances that reasonably cause or bring about, require, compel or necessitate action. The reference to "cause or bring about" is most apt to apply to cases where the defendant is under a duty to speak, where the duty itself is the source of the requirement, compulsion or necessity to act.

32. The appellant submits that it was therefore illogical and erroneous for the Court of Appeal, who accepted Parke B's first limitation,[34] to criticise the trial judge's reliance on pressing need, a concept encompassed within the first limitation (properly understood) on its very terms.

33. However, as noted in paragraph 24, it would be wrong to treat *Toogood v Spyring* as if it were a form of enacted law. In the appellant's submission, Parke B's judgment in that case is but one of a number of cases which support a more specific proposition, namely, that where the common law defence of qualified privilege is justified by reference to the defence of the defendant's personal interests, the defendant must establish that a reasonable person in the defendant's position would have thought that publication of the defamatory matter was necessary to defend those interests.

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[29] See [2011] NSWCA 59 at [10].
[30] *The Oxford English Dictionary* (2nd ed, 1989), Vol V, pp 539-540, "exigency" (meanings 1 and 2) and "exigent" (meanings 1 and 2).
[31] As it does in the commonly used expression "privileged occasion". Of course that usage assumes the logically anterior question of whether the circumstances are privileged. Parke B's first limitation is an attempt to answer that anterior question.
[32] *The Oxford English Dictionary* (2nd ed, 1989), Vol X, p 675, meaning 3a.
[33] *The Oxford English Dictionary* (2nd ed, 1989), Vol X, p 675, meaning 5.
[34] [2011] NSWCA 59 at [79]-[80] per McColl JA; see also Allsop P at [5]-[7].

34. Before examining the authorities, it is useful to consider why that should be so as a matter of principle.

D. Justifying qualified privilege in cases of defence of self-interest

35. As was recently discussed in *Aktas v Westpac Banking Corporation*[35] the broad rationale for qualified privilege is that some communications ought to be protected "for the common convenience and welfare of society".[36] In the present context, the following passage of Bankes LJ in *Gerhold v Baker*[37] is instructive:

> It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, *or on occasions when it is necessary to speak in the protection of some (self or) common interest.*

36. As this passage highlights, a distinction must be drawn between the two categories of case identified by Lord Macnaghten in *Macintosh v Dun*:[38] those communications made under a sense of duty and those in defence of one's own interest.

37. With regard to the former, the law would be incoherent if it were not to accept that communications made pursuant to a duty to speak were protected in the common convenience and welfare of society. This can be seen by considering a case where, in the circumstances, the defendant is found to be under a moral, social or ethical duty to communicate to the recipient (the reasoning applies to the case of a legal duty *a fortiori*).[39] In what circumstances such a duty will be found to exist cannot be exhaustively catalogued;[40] it will require a close examination of all of the circumstances and may involve questions of public policy.[41] But the conclusion that such a duty exists is a recognition that the great mass of the right-minded general public, in the defendant's position, would have considered it their duty to speak for moral or social reasons,[42] that

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[35] (2010) 241 CLR 79 at 89 [22] per French CJ, Gummow and Hayne JJ, see also at 103-106 [72]-[80] per Heydon J (dissenting).

[36] *Toogood v Spyring* (1834) 1 CM & R 181 at 193; 149 ER 1044 at 1050. See also *Macintosh v Dun* (1908) 6 CLR 303 at 305 per Lord Macnaghten (for the Board) (PC); *Justin v Associated Newspapers* [1967] 1 NSWR 61 at 75.

[37] [1918] WN 368 at 369 (CA) (emphasis added).

[38] (1908) 6 CLR 303 at 305.

[39] The existence of the duty to communicate *to the recipient* will invariably imply an interest in the recipient in the communication, since the recipient has an interest in the duty being performed.

[40] *Howe & McColough v Lees* (1910) 11 CLR 361 at 369 per Griffith CJ (Barton J agreeing).

[41] *Baird v Wallace-James* 1916 SC (HL) 158 at 163-164 per Lord Loreburn, cited in *Mowlds v Ferguson* (1940) 64 CLR 206 at 214 per Dixon J.

[42] See *Stuart v Bell* [1891] 2 QB 341 at 350 per Lindley LJ (CA), applied in *Watt v Longsdon* [1930] 1 KB 130 at 144 per Scrutton LJ (CA) and *Guise v Kouvelis* (1947) 74 CLR 102 at 114 per Starke J. See also *Howe &*

is for reasons justified at root by considerations of the public interest and the convenience of society as a whole. To conclude that a defendant who acted pursuant to such a duty is not protected by qualified privilege would be to conclude that although it is for the "common convenience and welfare" that such duties *exist*, it is not for the "common convenience and welfare of society" that such duties be *performed*.

38. Apart from malice, which always defeats the privilege since in such circumstances the defendant is actuated not by the performance of duty but by an improper motive, the only other limitation in principle is whether the publication was within the scope of the duty. That requirement is commonly expressed in the case law by saying that the "privilege only attaches to those defamatory imputations that are relevant to the privileged occasion".[43] And it may be accepted that in working out what was required by the defendant's duty, the law should not take an overly strict approach lest the performance of the duty be discouraged and undermined.

39. However, in cases justified on the basis of defending one's personal interests, the law must recognise a limit beyond the fact that the defendant is acting in self-defence in circumstances where the recipient also has an interest in the communication. Malice does not provide a sufficient limitation since, as explained in *Roberts v Bass*,[44] malice involves the defendant acting for an improper motive or purpose. The trader who published defamatory statements about the character of his competitor for the purpose of protecting the trader's business would not be malicious and this would be so even if the trader *knew* the statements were false, since the trader would be acting for the purpose for which the privilege was granted. Provided the recipients of the defamatory communications had an interest in the subject matter of the communication (e.g. the competitor's customers), in the absence of any other limitation the publication would be privileged.

40. Thus, the law has only recognised the privilege in cases where the communication is "made in the *legitimate* defence of a person's own interest".[45] In cases of defence of interest, there is a potential competition between interests: the defendant's interest, whether in protecting life, property, reputation, business or some other tangible interest,

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McColough v Lees (1910) 11 CLR 361 at 269 per Griffith CJ (Barton J agreeing); *Mowlds v Ferguson* (1940) 64 CLR 206 at 220 per Williams J ("great mass of Australians of ordinary intelligence and moral principle").

[43] *Bellino v ABC* (1996) 185 CLR 183 at 228 per Dawson, McHugh and Gummow JJ. See also *Adam v Ward* [1917] AC 309 at 320-321 per Earl Loreburn, 327 per Lord Dunedin, 340 per Lord Atkinson, 348 per Lord Shaw; *Cush v Dillon* (2011) 85 ALJR 865 at 870-871 [19]-[23] per French CJ, Crennan and Kiefel JJ, 875 [52] per Gummow, Hayne and Bell JJ.

[44] (2002) 212 CLR 1 at 30-33 [75]-[80], 34 [83] per Gaudron, McHugh and Gummow JJ.

[45] *Macintosh v Dun* (1908) 6 CLR 303 at 305-306, 400 (emphasis added).

and the plaintiff's interest in his or her reputation. *Prima facie* the law of defamation protects the plaintiff's interest: the plaintiff has a right to protection against harm to reputation. This may be thought to follow from the common convenience and welfare of society. However, there are circumstances where it is for the common convenience and welfare of society that reasonable persons in the defendant's position[46] be entitled to protect their interests by making a defamatory publication even though it harms the plaintiff's reputation. The question is: when is a defamatory publication in defence of self-interest justified?

41. The answer was provided in this Court in *Norton v Hoare (No 1)*.[47] In that case, the plaintiff published an article in a newspaper attacking the defendant and the defendant's newspaper. The defendant published a defamatory article in reply and the plaintiff brought an action in libel for that publication. The defendant sought to plead a defence of qualified privilege based on justified defence of property (i.e. his newspaper) but part of the defence was struck out and leave to amend subsequently refused. The question for this Court was whether the proposed defence was supportable as a matter of law. In deciding that it was, all members of the Court recognised that the defence of qualified privilege involving the protection of property rested on the same principle as that justifying self-defence against physical attack, namely reasonable necessity.[48] Barton ACJ (with whom Powers J agreed) identified that "the protection which the law allows to the honest repulse by defamatory matter, believed to be true, of a public attack on a defendant's character" stood "on the same ground as the reasonably necessary return of physical blows in self-defence against aggression, and the degree of protection given is limited in a closely analogous way."[49] The joint judgment of Isaacs, Gavan Duffy and Rich JJ (with which Powers J also agreed) spoke similarly:[50]

> These cases and others ... show that in defence of property an assault on the person or the property of another may be justified, if necessary for the protection of the defendant's property. ... Though couched in somewhat different terms, the rule is substantially based on the same fundamental considerations as that with regard to privileged communications formulated in *Toogood v Spyring*, which, as Parke B says, must be "fairly warranted by any reasonable occasion or exigency".

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[46] The concern is not for the particular defendant, but the reasonable person (as an exemplar of society) placed in a similar situation as the defendant.
[47] (1913) 17 CLR 310.
[48] (1913) 17 CLR 310 at 316-318 per Barton ACJ (Powers J agreeing), 320-322 per Isaacs, Gavan Duffy and Rich JJ (Powers J agreeing). The same analogy was colourfully drawn by Lord Oakey in *Turner v MGM Pictures* [1950] 1 All ER 449 at 470-471 (HL). Self-defence in battery was considered in this Court in *Fontin v Katapodis* (1962) 108 CLR 177 at 181-182 per McTiernan J, 185-186 per Owen J (Dixon CJ agreeing).
[49] (1913) 17 CLR 310 at 318.
[50] (1913) 17 CLR 310 at 322.

42. In the appellant's submissions, reasonable necessity is a principled, yet sufficiently flexible, answer to the question posed in paragraph 40. The defence of one interest in such a way as to interfere with another interest that ordinarily merits the law's protection can only be justified in so far as is necessary in the circumstances. And given that the defence of qualified privilege is given, not for the convenience and welfare of the defendant, but for the community as a whole, the required protection is that which reasonable persons in the defendant's position would think necessary.

E. The authorities

43. The requirement in cases of interest that the circumstances require, compel or necessitate publication existed well before *Toogood v Spyring*.

44. In *Brown v Croome*,[51] a libellous advertisement in a local paper addressed to creditors for the purpose of convening a meeting of the creditors of a bankrupt made attacks on the character of the bankrupt. The defendant contended that the communication was privileged. In rejecting the defence, Lord Ellenborough CJ stated:

> The question is, whether the defendant was justified in publishing this advertisement to the world, when all the communication which was necessary might have been made in a manner less injurious.

His Lordship observed:

> If it could be shewn, that an advertisement [in the paper] was the only possible means of communicating notice of the circumstances, it might be sufficient to vindicate the mode; one person could have no right to take measures for his own benefit to the injury of another ... [the] defendant made no progress in his defence, unless he could shew that such a publication was the only effectual mode of convening the creditors. A communication sufficient for the purpose might have been made in measured language.

45. Writing four years before *Toogood v Spyring* in *Starkie on Libel and Slander*,[52] Starkie relied on *Brown v Croome* for the proposition that "it seems clear, that whether the occasion and circumstances supply an absolute or merely qualified justification, dependent on the question of actual malice, they do not extend to justify any publication which is *not warranted by the occasion* and circumstances."[53] The influence of Starkie on Parke B's judgment in *Toogood v Spyring* was noted by Gummow J in *Bashford*.[54]

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[51] (1817) 2 Stark 297; 171 ER 652.
[52] (2nd ed, 1830) at 326-328.
[53] *Starkie on Libel and Slander* (2nd ed, 1830), p 326 (emphasis added).
[54] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 416 [137].

46. The language of necessity was also reflected in the "principle on which privileged communication rests" stated by Parke B's contemporary, Lord Denman CJ:[55]

> Any one, in the transaction of business with another, has a right to use language *bona fide* which is relevant to that business and which a due regard to his own interests makes necessary, even though it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests.

47. Writing in 1914, Newell summarised the position in England and America in this way:[56]

> A defamatory communication when *necessary* to protect one's own interests is privileged, when made to persons who also have a duty or interest in respect of the matter. In such cases, however, it must appear that he was *compelled* to employ the words complained of. *If he could have done all that his duty or interest demanded without libeling or slandering the plaintiff*, the words are not privileged.

48. It is true that the dicta of Lord Atkinson three years later in *Adam v Ward*[57] may at first be thought to cast doubt on this statement of the law. The facts of *Adam v Ward* are conveniently set out in the reasons of French CJ, Crennan and Kiefel JJ in *Cush v Dillon.*[58] The case was one where the defamatory communication was made pursuant to duty[59] and certain statements alleged not to be relevant were held, in fact, to be necessary for the proper discharge of the defendant's duty.[60] The question for their Lordships was whether the publication was "a performance of a moral if not even of a legal duty and as such privileged".[61] Various verbal formulations were suggested to answer this question which, as explained in paragraph 38, is really an assessment of the scope of the defendant's duty: Did the defendant publish something "beyond what was germane and reasonably appropriate to the occasion"?[62] Was the defamatory statement "quite unconnected with and irrelevant to the main statement"?[63] Does the

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[55] *Tuson v Evans* (1840) 12 A & E 733 at 736 per Lord Denman CJ (for the Court); 112 ER 991 at 993. See also *Wenman v Ash* (1853) 13 CB 837 at 845 per Maule J ("No reasonable person could think the course the defendant took was one which he was justified in taking to his enforce his own interest"), 846 per Cresswell J; 138 ER 1432 at 1435, 1436.

[56] ML Newell and MH Newell, *The Law of Libel in Civil and Criminal Cases* (3rd ed, 1914), p 614 (emphasis added).

[57] [1917] AC 309 at 334, 339.

[58] (2011) 85 ALJR 865 at 870 [19]-[21].

[59] *Adam v Ward* [1917] AC 309 at 319 per Lord Finlay LC, 321-322 per Earl Loreburn, 323 per Lord Dunedin, 346 per Lord Shaw.

[60] *Adam v Ward* [1917] AC 309 at 319-320 per Lord Finlay LC, 329 per Lord Dunedin, 342 per Lord Atkinson, 348-349 per Lord Shaw

[61] *Adam v Ward* [1917] AC 309 at 324 per Lord Dunedin.

[62] *Adam v Ward* [1917] AC 309 at 321 per Earl Loreburn.

[63] *Adam v Ward* [1917] AC 309 at 327 per Lord Dunedin.

communication deal with matter not in any reasonable sense germane to the subject-matter of the occasion"?[64]

49. However, in dicta Lord Atkinson went further and stated:[65]

> The authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; *but that, on the contrary, he will be protected, even though his language should be violent and excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.*

50. A number of points should be made about this passage. First, Lord Atkinson's analysis was premised on the assumption that the occasion justified publication, and was responding to an argument that the language used was excessive. His Lordship was not addressing the issue of whether any publication was warranted. Secondly, the authorities relied on by Lord Atkinson to come to his conclusion[66] all concern whether an excessive statement could provide evidence of express malice for the jury. To rely on these cases in relation to the scope of the privilege is to confuse two separate issues: whether the communication is privileged absent malice (Parke B's first limitation) and whether there was malice (Parke B's second limitation).[67] Excess in communication may be evidence of malice, but the two things are different. Thirdly, even if the fallacy is committed of conflating malice and whether the occasion is privileged, the primary authority relied on by Lord Atkinson, *Laughton v Bishop of Sodor and Man*, only supports the view that a test of absolute necessity is not appropriate. The key passage reads:[68]

> Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications.

Fourthly, Lord Atkinson's test ("he might have honestly *and on reasonable grounds* believed that what he wrote or said was true *and necessary*") is one of self-defence

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[64] *Adam v Ward* [1917] AC 309 at 348 per Lord Shaw.
[65] *Adam v Ward* [1917] AC 309 at 339 per Lord Atkinson (emphasis added).
[66] *Spill v Maule* (1869) LR 4 Ex 232; *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495; *Nevill v Fine Arts and General Insurance Co* [1895] 2 QB 156 (CA).
[67] See *Adam v Ward* [1917] AC 309 at 321 per Earl Loreburn, discussed in *Cush v Dillon* (2011) 85 ALJR 865 at 871 [25].
[68] (1872) LR 4 PC 495 at 508.

(although on the criminal standard).[69] In the appellant's submission, Lord Atkinson's formulation really only emphasises that the assessment of necessity should be made by considering the response of reasonable person in the defendant's position (e.g. with the defendant's knowledge of the circumstances) rather than a purely objective bystander. Understood thus as an exposition of the limits of self-defence, his Lordships's dicta is consistent with the decision of this Court in *Norton v Hoare (No 1)* (analysed in paragraph 41) and with Earl Loreburn's statement in *Adam v Ward* that "no one can be justified in using [an occasion of privilege] beyond the reasonable limits of self-defence".[70]

10 51. The later decision of this Court in *Guise v Kouvelis*[71] confirms the requirement that the circumstances must necessitate publication of the defamatory matter. In that case the plaintiff was a visitor at a club of which the defendant was a member and committeeman. The defendant accused the plaintiff in a loud voice of cheating at cards in front of a large number of people at the club. Latham CJ (McTiernan and Williams JJ agreeing) rejected the defence of qualified privilege based on the protection of the defendant's personal interests (namely the interest in the character of persons attending the club) in the following terms:[72]

> In the present case the defendant was not defending or protecting his own purely personal interests ... Protection of such interests did not require any statement about
20 the plaintiff to any other person. The defendant could protect himself against the plaintiff by abstaining from having anything to do with him and there was, from this point of view, no warrant for making any statement to any other person that the plaintiff was dishonest, even if the defendant honestly believed that to be the case. ... The defendant could have told the plaintiff, without making any defamatory allegation, that he would report his conduct to the committee. If the defendant had then, honestly believing that the plaintiff was a crook, said so to the committee, the common interest of the members of the club, and even of potential visitors, would have been adequately protected.

Dixon J dissented. On the facts he thought Parke B's first limitation was satisfied.[73]

30 52. Thus, in the appellant's submission both principle and authority[74] support the proposition articulated in paragraph 33 above.

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[69] In the appellant's submission, given the vastly different context, little assistance is gained by consideration of what the same verbal formulation means in the criminal law of self-defence (see e.g. *Zecevic v DPP (Vic)* (1987) 162 CLR 645; *Conlon* (1993) 69 A Crim R 92; *Oblach v R* (2005) 65 NSWLR 75).
[70] *Adam v Ward* [1917] AC 309 at 321 per Earl Loreburn.
[71] (1947) 74 CLR 102.
[72] (1947) 74 CLR 102 at 111 per Latham CJ (McTiernan and Williams JJ agreeing).
[73] (1947) 74 CLR 102 at 124 per Dixon J.
[74] *Brown v Croome* (1817) 2 Stark 297; 171 ER 652; *Toogood v Spyring* (1834) 1 CM & R 181 at 193; 149 ER 1044 at 1049-1050; *Tuson v Evans* (1840) 12 A & E 733 at 736; 112 ER 991 at 993; *Wenman v Ash* (1853) 13

F. Pressing need

53. To satisfy the test of reasonable necessity the defendant must have a need to protect his or her personal interests. Furthermore, the concept of reasonable necessity emphasises:

    (a) that it is not enough for the defendant to honestly believe there is a need to protect his or her interests; and

    (b) the circumstances must be such that a reasonable person in the defendant's position would think so.

54. Where the communication is not volunteered, but in response to a request for information or an attack, this will commonly be so. However, in cases where the communication is volunteered, in deciding whether publication was necessary in the defendant's interests, a reasonable person in the defendant's position would likely have regard to such matters as:

    (a) the nature of the interests sought to be protected;

    (b) the nature, degree and imminence of harm to the interests contemplated;

    (c) whether alternative effective means to protect the defendant's interests, other than publication of the defamatory matter, were available;

    (d) whether, if no other means were available, the nature, degree and imminence of the harm contemplated would justify publication; and

    (e) whether, if other means were available, nevertheless the nature, degree and imminence of the harm would justify publication.

55. In the appellant's submission, these are the very matters which bear on the existence of a "pressing need". It is difficult to see how a defendant could *ordinarily* be justified in protecting his or her personal interests by volunteering potentially defamatory statements where there was no pressing need (say by reason of imminent or serious or irreparable harm or an absence of other effective methods of defence) to protect those interests.

CB 837 at 845, 846; 138 ER 1432 at 1435, 1436; *Norton v Hoare (No 1)* (1913) 17 CLR 310; *Adam v Ward* [1917] AC 309; *Gerhold v Baker* [1918] WN 368 at 369; *Guise v Kouvelis* (1947) 74 CLR 102.

56. The last proposition is supported by the statements of McHugh J in *Bashford* quoted in paragraph 19 above. Nothing in the reasons of the majority in that case casts doubt on those statements: the case was decided on the basis of the defendant's duty to publish.[75]

57. Apart from principle, as a matter of authority, prior to the Court of Appeal's decision in this case, McHugh J's statement in *Bashford* concerning "pressing need" and the need for "imminent harm" had been approved by that Court in *Goyan v Motyka* [2008] NSWCA 28 at [86] per Tobias JA (Giles JA agreeing) and *Bennette v Cohen* [2009] NSWCA 60 at [21] and [25(d)(iv)] per Ipp JA (Campbell JA agreeing) and [145] per Tobias JA.

10 *G. Application of principle to facts*

58. The trial judge was right to conclude that the publication of the corruption allegations was not, in the language of Parke B, "fairly warranted *by any reasonable occasion or exigency*". The question was not whether the publication was "fairly warranted".[76] Nor, having regard to both principle and authority, was the trial judge wrong to consider whether there was a "pressing need" for publication. That is an aspect of the reasonable necessity test which accords with both principle and authority.

59. In the circumstances, no reasonable person in the respondent's position could have thought that the protection of his interests compelled or necessitated the publication of serious allegations of criminality against the appellant:

20 (a) The respondent's ultimate interest was in the takeover bid succeeding. He had no legitimate interest in attacking opponents to his proposal with unrelated allegations he had known about for between 2 and 7 months and done nothing about.

(b) A reasonable person in the respondent's position, and with the respondent's knowledge, would have appreciated that there was no urgency or compelling need to publish the letter. That is demonstrated by the respondent's failure to answer Mr Ferguson's attempts to contact him.

(c) The corruption allegations were totally unconnected with the misleading conduct allegation in imputation (a).

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[75] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 219 CLR 366 at [23]-[25] per Gleeson CJ, Hayne and Heydon JJ, [145] per Gummow J, [187] per Kirby J.
[76] Cf [2011] NSWCA 59 at [10] per Allsop P.

(d) Even if it is accepted that the circumstances compelled the respondent to try to stop the appellant spreading what the respondent thought was misleading information, that could not justify including in his letter vague and, on the face of the letter, admittedly speculative, allegations about the possibility of the appellant obtaining a benefit from his son's employment at Souths.

Part VII: Applicable statutory provisions

60. There are no relevant statutory provisions.

Part VIII: Orders sought

61. The appellant seeks the following orders:

10 1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales and, in place thereof, order that the appeal to that Court be dismissed with costs.

3. The respondent to pay the appellant's costs in this Court.

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