SUPREME COURT OF QUEENSLAND

CITATION:	*Bill Karageozis as trustee for the bankrupt estate of Siobhan Lamb v Sherman* [2023] QCA 258
PARTIES:	**BILL KARAGEOZIS AS TRUSTEE FOR THE BANKRUPT ESTATE OF SIOBHAN LAMB** (applicant/appellant) **v** **SHELDON SHERMAN** (respondent)
FILE NO/S:	Appeal No 12902 of 2022 DC No 1634 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2022] QDC 215 (Jarro DCJ)
DELIVERED ON:	15 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2023
JUDGES:	Mullins P and Dalton and Flanagan JJA
ORDERS:	**1. Allow the application for leave to appeal.** **2. Allow the appeal, set aside the order of the primary judge made on 23 September 2022 and in lieu thereof order judgment for the defendant.** **3. The respondent is to pay the appellant's costs of this appeal.** **4. The appellant is to file and serve written submissions as to costs of the District Court proceeding (no more than five pages) and affidavit material (if any) within 14 days of the date of this judgment.** **5. The respondent is to file and serve written submissions as to costs of the District Court proceeding (no more than**

five pages) and affidavit material (if any) within 14 days thereafter.

6. The appropriate order as to costs is be determined on the papers.

CATCHWORDS :

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – IMPUTATION – OTHER CASES – where Ms Lamb and the respondent worked for the same organisation and were in a sexual relationship which eventually ended – where the respondent alleged Ms Lamb made two defamatory publications after the relationship had ended – where the primary judge found that only one defamatory publication occurred – where the alleged defamatory publication was made orally by Ms Lamb to a police officer – where the respondent complained that Ms Lamb's publication conveyed four imputations – whether the primary judge erred in finding that the publication carried the imputations complained of

DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE – STATEMENTS MADE IN RESPECT OF A DUTY OR INTEREST – whether the primary judge erred in holding that Ms Lamb did not make the publication to police on an occasion of qualified privilege at law

DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE – REBUTTAL OF PRIVILEGE BY MALICE – whether the primary judge erred in finding that Ms Lamb was actuated by malice in complaining to the police

DEFAMATION – OTHER DEFENCES – TRIVIALITY – where Ms Lamb relied on the triviality defence under the *Defamation Act 2005* (Qld) – where the primary judge found the defence of triviality did not apply – whether the primary judge erred in rejecting the triviality defence

Defamation Act 2005 (Qld), s 33

Bailey v WIN Television NSW Pty Ltd (2020) 104 NSWLR 541; [2020] NSWCA 352, cited
Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366; [2004] HCA 5, considered
Bazzi v Dutton (2022) 289 FCR 1; [2022] FCAFC 84, cited

Cush v Dillon (2011) 243 CLR 298; [2011] HCA 30, considered
Haddon v Forsyth [2011] NSWSC 123, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Mann v O'Neill (1997) 191 CLR 204; [1997] HCA 28, cited
McKenzie v Mergen Holdings Pty Ltd (1990) 20 NSWLR 42; [1990] Aust Torts Reports 81-041, cited
Morosi v Mirror Newspapers Ltd [1977] 2 NSWLR 749, cited
Murray v Raynor [2019] NSWCA 274, considered
Nationwide News Pty Ltd v Warton [2002] NSWCA 377, considered
Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57, cited
Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496, considered
Sherman v Lamb [2022] QDC 215, related
Shiels v Manny (2012) 263 FLR 61; [2012] ACTCA 22, cited
Smith v Lucht [2017] 2 Qd R 489; [2016] QCA 267, cited
Stocker v Stocker [2020] AC 593; [2019] UKSC 17, considered

COUNSEL: K P Smark SC for the applicant/appellant
N H Ferrett KC, with J R Moxon, for the respondent

SOLICITORS: BlackBay Lawyers for the applicant/appellant
Romans and Romans Lawyers for the respondent

[1] **MULLINS P:** I agree with Dalton JA.

[2] **DALTON JA:** This is an application pursuant to s 118(2)(a) of the *District Court of Queensland Act 1967*. The proposed appeal is to overturn the primary judge's conclusion that Ms Lamb had defamed Mr Sherman. The appeal is brought by Ms Lamb's trustee in bankruptcy. He was appointed after, and as a consequence of, the judgment in the District Court. While the judgment was for only $10,000, costs of the proceeding were in the vicinity of $600,000, and caused Ms Lamb to become bankrupt. The orders sought on appeal are that the judgment of the primary judge be set aside and instead, that there be judgment in favour of Ms Lamb on the defamation proceeding, together with costs. In my view, the application for leave ought to be granted having regard to the substantial merits of the issues

sought to be agitated on appeal, there would otherwise be a substantial injustice having regard to those merits. Secondly, one of the issues raised on appeal is of general importance: when a complaint or information provided to police will attract the defence of qualified privilege. I will use the term appellant rather than applicant in the remainder of this judgment.

Background Facts

[3] Ms Lamb and Mr Sherman worked for the same organisation. They began having a sexual relationship in about August 2019. Mr Sherman's marriage had ended in about January 2019, and he was engaged in Family Court proceedings against his wife. Those proceedings included custody and access arrangements. Ms Lamb had been in a de facto relationship for approximately seven years, and the trial judge found that she continued in it during her sexual relationship with Mr Sherman.

[4] Ms Lamb said the relationship with Mr Sherman ended in about February 2020. Mr Sherman said it ended on 19 March 2020 when he discovered that Ms Lamb was in a de facto relationship with someone else.

[5] Mr Sherman alleged two defamatory publications. One was alleged to have been made orally by Ms Lamb to a police officer on 19 March 2020. The second was alleged to have been made orally by Ms Lamb to the lawyers acting for Mr Sherman's wife on 19 or 20 March 2020. The primary judge found that only one publication occurred – that to the police officer. There was no challenge to the primary judge's finding that the second publication had not been proved. Accordingly, this appeal is concerned only with the publication to the police officer.

[6] That publication, and the imputations said to arise from it, were outlined by the primary judge as follows:

> "[6] The first publication is said to have occurred on 19 March 2020 from about 3:10 pm when the defendant made an oral complaint about the plaintiff to Senior Constable Dominic Trevor of the New South Wales Police. It is alleged that in the course of making that complaint, the defendant said:
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> > 'Sheldon Sherman and I worked together for the same company. Sheldon worked in the Brisbane office and I worked in the Sydney office. We met at a work event in August 2019 and started an on-again-off-again relationship that lasted 7 months. I ended the relationship in February 2020 after Sheldon stopped listening to me and the line between our work life and our relationship

> became blurred. After I ended the relationship, Sheldon continued to contact me through various means which, on the whole, I ignored.
>
> On Friday 13 February 2020 I was forced into resigning my job by the CEO of the company after he found that I held shares in and was a stakeholder in a rival company. I believe that Sheldon provided this information to the CEO because they are good mates.
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> On Friday 13 March, Sheldon sent me a text message saying, "Can I call you?" I wrote back "Not comfortable with this at all." Sheldon then replied saying "Can I call you?"
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> Over the following days, Sheldon contacted my family and attempted to arrange a time to drop my belongings back to me. Sheldon told me that he would contact the university I attend and advise them that I had applied for my current course fraudulently unless I responded to his calls and texts.
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> I do not want to have any further contact with Sheldon and I do not want any my personal belongings which are still in his possession.'

[7] It has been asserted that the first publication identified the plaintiff and was understood to refer to the plaintiff. In my view, that is readily apparent in the form which it has been pleaded. The plaintiff has also asserted that the imputations arising from the first publication were that:

(a) the plaintiff is a petty person;

(b) the plaintiff is a vengeful person;

(c) the plaintiff is a dishonest person;

(d) the plaintiff is the kind of person who engages in domestic violence."

Imputations

[7] The primary judge found that the imputations he listed at (a) and (d) above arose from the publication to the police officer. The appellant challenged those findings. The respondent, by notice of contention, said that the primary judge ought to have found the

imputation at (b) arose from the publication. Counsel for the appellant resisted that, but to be fair, conceded that his argument on the point was difficult.

[8] The appellant accepted that the primary judge correctly set out the relevant law at [44] and [45] of the judgment below. The primary judge had regard to *Rush v Nationwide News Pty Ltd (No 7)*[1] for the following propositions. Whether or not an imputation is conveyed is a question of fact, and to be judged from the perspective of a hypothetical ordinary reasonable listener: a person "of fair average intelligence, not avid for scandal, but prone to a degree of loose thinking and capable of reading between the lines".[2] Each alleged defamatory meaning has to be considered in the context of the published matter as a whole. What meaning an ordinary reasonable listener attributes to a publication may be influenced by its overall tone, "if the article is tinged with insinuation or suggestion, it may be more likely to convey defamatory material".[3] In considering the meaning of what is published one considers, "inferences which the ordinary reasonable reader would draw, based on their general knowledge and experience. This is a matter of impression, unfettered by strict legal rules of construction."[4] Lastly, "the publisher's intended meaning is irrelevant".[5]

[9] Because the question of whether or not an imputation is conveyed is a question of fact, an appellant must show an error in the primary judge's fact-finding. That is not so difficult as it might be in other legal contexts, because the test as to whether an imputation arises is an objective one, so that an appeal court is in as good a position as a trial judge to determine whether or not an imputation is conveyed by a publication.[6] In my view the findings of the primary judge were erroneous, both as alleged in the notice of appeal and the notice of contention.

[10] I will deal first with the imputation that the respondent was the kind of person who engages in domestic violence. The judge below gave almost no reasons for finding that imputation arose. He said only, "It is a bit more than, as the defendant submitted, the plaintiff simply harassed the defendant after the defendant ended their relationship." – [46].

[11] I agree with the appellant's submission that the pleaded imputation involves a serious allegation and that in those circumstances, "It is fair to ask, as Lord Kerr JSC did in *Stocker v*

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1 [2019] FCA 496, [72]-[84].
2 [44] of the judgment below, summarising the decision in *Rush* (above).
3 Ibid.
4 Ibid.
5 Ibid.
6 *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541, [43]-[46]; *Bazzi v Dutton* (2022) 289 FCR 1, [26]-[28].

Stocker[7] at [50], why [Ms Lamb] would not have said so explicitly if she had meant to accuse the Respondent of being prone to engage in domestic violence".[8] I think this point is particularly well made in the context where Ms Lamb was complaining to a police officer. Had Ms Lamb been the victim of domestic violence, such an officer was the appropriate person to complain to.

[12] There may be a question as to what the ordinary reasonable listener would understand as domestic violence. It would be wrong to impute to the hypothetical listener the detailed and extended definitions of that term which are found in statutes throughout Australia. However, as counsel for the appellant conceded, such extended definitions in statutes start to change the way ordinary people think of behaviour.[9] In particular, it may be that an ordinary reasonable listener, with their assumed general knowledge, conceives of domestic violence as behaviour short of actual physical violence. Likewise, some of the behaviour described to the police officer might be consistent, in the mind of an ordinary reasonable listener, with behaviour of a coercive or controlling kind, which can precede domestic violence. I think that general knowledge and experience, assumed to be possessed by an ordinary reasonable listener, might include that the end of a relationship is a time at which a person prone to engage in domestic violence will display that behaviour. However, even making those assumptions in favour of the respondent, in my view the information given to the police officer still falls short of any express or implied description by Ms Lamb that the respondent had engaged in domestic violence.

[13] Independently to the foregoing, I accept a second argument made on behalf of the appellant. The imputation pleaded is not that the respondent had on an occasion or occasions engaged in domestic violence towards Ms Lamb. It was that he was the kind of person who engages in domestic violence. That is, it was an imputation which slurred his general character or disposition. In *Nationwide News Pty Ltd v Warton*[10] the New South Wales Court of Appeal collected a number of cases which discuss whether or not publication of (in that case) an isolated act of dishonesty, can give rise to an imputation of a general sort, that a person is habitually dishonest, or of a dishonest character. Unsurprisingly, the factual circumstances, including the seriousness of the isolated act described in the publication, will be relevant to whether or not such an imputation is made in any particular case. The conclusion in *Warton* was:

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7 [2020] AC 593, [50].
8 Amended written submissions on the part of the appellant, para 11.
9 *Haddon v Forsyth* [2011] NSWSC 123.
10 [2002] NSWCA 377, [46]ff.

> "While a person can do a dishonest thing without being thought a dishonest person, some things are so dishonest that one can infer that only a dishonest person would do them. The activities attributed to the plaintiff in the article are so extensive, serious and risky that it is open to ordinary reasonable readers to infer that only a dishonest person would have done them." – [61]

[14] In this case, even if the description of repeated attempts to contact Ms Lamb after the end of a sexual relationship, and the accompanying threat, could be conceived of as domestic violence by an ordinary reasonable listener, I am not of the view that the attempts described were so serious, repeated, prolonged or obviously unwelcome that the description of the respondent's behaviour carried the imputation that he was the kind of person who engages in domestic violence.

[15] So far as the inference that the respondent was a petty person, the trial judge said:

> "… After the relationship between the parties imploded, on 19 March 2020, the defendant made a complaint to police about the plaintiff's behaviour. An ordinary reasonable recipient upon hearing the allegations would glean that when the relationship ended, the plaintiff continued to contact her through various means which, on the whole, she ignored and yet he continued to contact her family and also threatened to contact the university that she attended in order to advise them that she applied for her current course fraudulently should she not respond to his call/texts. An ordinary reasonable recipient would form the view that the plaintiff is, from that behaviour, a petty person. An ordinary reasonable recipient of such information would also likely form the view that the plaintiff is a kind of person who engages in domestic violence. The statement is defamatory because, in my assessment, it would cause 'ordinary decent folk in the community, taken in general, to think less of the plaintiff'. …" – [46].

[16] I have difficulty seeing that the publication conveyed an imputation that the respondent was petty. The communication was made in serious circumstances, to a police officer. The factual matters communicated were that the respondent continued to contact Ms Lamb after the end of a relationship when that was unwelcome to her; that the respondent provided information to Ms Lamb's employer which caused her to be constructively dismissed; that the respondent attempted to arrange the return of Ms Lamb's possessions, and that the

respondent threatened to contact Ms Lamb's university to advise that she had been fraudulent when applying for her university course. I cannot see that an ordinary reasonable recipient of this information might think the respondent petty. To the contrary, most of the behaviour described is serious rather than petty. The exception is the respondent's attempts to return her possessions. The description of that behaviour might convey a responsible attitude, but again not a petty one. As a matter of fact, the publication was not capable, in my view, of conveying to an ordinary reasonable listener that the respondent was small-minded, trivial or caught up in minutiae.

[17] It was submitted on behalf of the appellant that an ordinary reasonable listener might think that a person who behaved in the way Ms Lamb described was petty, "but that meaning is so inconsequential that it simply would not have occurred to the ordinary reasonable listener as part of the broad impression created by the First Publication". I accept that where defamation is alleged to have occurred through a "conversational medium", it is wrong to engage in elaborate analysis of meaning.[11] I am not convinced that a complaint to police can be categorised as ordinary, somewhat ephemeral conversation. It is a more important communication than ordinary conversation. It will likely be recorded in some way. In any case, I cannot see that even an elaborate parsing over of the information communicated to the police officer by Ms Lamb would lead an ordinary reasonable person to think that the respondent was petty; the conduct she described was serious, not trivial.

[18] Consistently with that factual view, I think that the respondent ought to succeed on his contention that the publication conveyed an imputation that he was vengeful. The publication describes that at the end of a short sexual relationship with a workmate, the respondent took steps to have Ms Lamb constructively dismissed from her employment, and threatened her university enrolment when she refused to continue communicating with him. It seems to me that an ordinary reasonable listener would understand that Ms Lamb was conveying more than a description of a disappointed sexual partner reacting in an ordinary emotional way to the end of a relationship. She was conveying information that the respondent had used information which he had gained during the course of the relationship to have Ms Lamb's employment terminated and to threaten her tertiary study. Given the seriousness of the conduct described, and its being out of any reasonable proportion to the end of a short relationship between workmates, my view is that the publication did convey an imputation, not just that the respondent had been vengeful towards Ms Lamb, but that he was a vengeful person – cf the discussion at [13] above. In my view this was the only one of the

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11 *Bazzi v Dutton* (above), [29].

pleaded imputations conveyed by the publication to the police officer.

Qualified Privilege

[19] The appellant challenged the primary judge's conclusion that the first publication was not made on an occasion of qualified privilege at common law. The primary judge cited *Bashford v Information Australia (Newsletters) Pty Ltd*[12] as to the content of this common law defence:

> " … 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, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable emergency 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". – [9] per Gleeson CJ, Hayne and Heydon JJ.
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> …
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> "[64] The correct approach to determining whether occasion is privileged is contained in a passage in *Baird v Wallace-James* that members of this court have cited with approval. In *Baird*, Earl Loreburn said:
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> > 'In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel, and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty; and the consideration of these things may involve the consideration of questions of public policy.' – per McHugh J.

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12 (2004) 218 CLR 366. In fact the passage cited by the primary judge is from *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 [1834] EngR 363; 149 ER 1044 at 1049-1050.

[20] In relation to whether or not the communication in this case was made on an occasion of privilege, the primary judge reasoned thus:

> "[54] On the defendant's behalf, it was submitted that the publication of the first matter complained of was clearly on an occasion of qualified privilege at common law. Noting that there is a presumption of honesty, a woman who believes she is being harassed clearly has a legitimate interest in reporting that conduct to a police officer. In turn, and for obvious reasons, the police officer has a reciprocal duty to receive that complaint.
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> [55] That may be so. However, in relation to that publication, it was pleaded on her behalf that she had an interest 'in reporting [the defendant's] behaviour toward her to the New South Wales police who in turn had an interest in, and a duty to receive, that information'. However the latest amended pleading, which was filed at the commencement of the trial, reveals that, as the plaintiff has usefully identified, the defendant 'conspicuously deleted[d] an allegation that the conduct amounted to domestic violence'.
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> [56] On behalf of the plaintiff, it has been accepted that police have an interest in receiving information about domestic violence (or the commission of an offence more generally), but the same cannot be said about conduct which is not an offence, however is merely (if at all) morally objectionable. Police have no interest in or a duty to receive gossip or adverse commentary. Therefore, when the subject matter of the defendant's communication is so broadly construed, any necessary community of interest disappears. The common law requires a 'community of interest' in the sense of 'a duty to speak and listen to what is conveyed'. The duty 'requires more than an idle curiosity in the concerns of another. It also requires more than a mere belief that the recipient will be interested in the relevant information or that it is appropriate to communicate that information'. I accept these submissions and I am satisfied the defence does not arise with respect to the first publication. There is no 'community of interest' arising in the circumstances of the first publication."

[21] To say that qualified privilege will only attach to a report to police when the conduct reported amounts to a crime, takes too limited a view of the reciprocity which is the foundation of the privilege. In *Cush v Dillon*[13] French CJ, Crennan and Kiefel JJ stated that, "… no narrow view should be taken of the pursuit of a duty or interest [by the publisher] in what was said. To do so may unduly restrict the operation of the defence". That statement was in a similar factual context to the present. The publisher in that case was a member of the board of a statutory authority. During a private conversation, she told the chairperson of the board that it was common knowledge that another board member was having an affair with the general manager of the authority. This was causing disquiet amongst the staff of the authority. It was held that there was the necessary reciprocity of duty and interest to render the private conversation a privileged occasion, and that the privilege extended to the communication of a rumour (not a known fact) which was relevant to the operation of the authority, and staffing issues within the authority.

[22] I accept the appellant's submissions that the reasoning applies with at least equal force in this context. First, as the appellant submitted, "… it should be borne in mind that one of the duties of police is to keep the peace, including by warning a person off a course of conduct which, while not yet criminal, might become so if continued".[14] I think this is particularly so where it is common knowledge, not just in the courts, but also in society, that the potential for domestic violence may be signalled by behaviour which is not criminal. It would be most undesirable if the law did not allow the reporting of concerns about such behaviour to police. Of course, qualified privilege will never apply as a defence where there is malice. Communications to the police are not protected by absolute privilege.[15] However, where there is sincere concern about behaviour, a reciprocal interest and duty between the publisher and the police may well exist even if the behaviour reported is not criminal.

[23] Another point made by the appellant is that someone who makes a complaint or gives information to police cannot know what information the police already have. There is no suggestion that the respondent here was known to police in any way whatsoever. However, a complainant to police is not to know the significance of the information reported in the context of other information already held by police. One needs only think of calls from police during an investigation that members of the public report any information they have, no matter how insignificant it seems to them. Police may well have an interest in receiving information which could never be evidence in a court of law because it is

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13 (2011) 243 CLR 298, [22].

14 Appellant's amended written submissions, para 18.

15 See *Shiels v Manny* (2012) 263 FLR 61, [34]-[35] and [47] for a discussion of these principles.

hearsay, or even rumour. It may nonetheless be very helpful to a police investigation, or it may bring about a duty to investigate.

[24] Another matter to bear in mind is that, particularly with cases which involve disclosure of information which is very personal, or which a complainant may feel is shameful, a complainant might give broad, general, or even incomplete information to police. The person providing information to police may be distressed, not thinking rationally, or frightened for the consequences to themselves, or others, of speaking to police. There may be many reasons why what is reported to police does not amount to a criminal offence.

[25] In my view, the judge below erred in finding that there was no community of interest or reciprocal duty and interest between Ms Lamb and the police officer when she made a complaint to him. What she reported was behaviour which was serious enough. It might indicate a propensity to engage in domestic violence. In fact, the making of a threat with no lawful justification may well amount to a criminal offence, although I would not like to put my decision on that basis.

Malice

[26] To understand the trial judge's reasoning about malice, it is necessary to understand a little more about what Ms Lamb said to the solicitor who represented the respondent's wife in the Family Court proceedings. Ms Lamb remembered the name of the barrister who represented the respondent's wife, because the respondent used to complain about her. After her relationship with the respondent broke up, Ms Lamb contacted that barrister. The barrister put her in contact with the wife's solicitors. The primary judge found that the solicitor had too little recall of what was said to prove a defamatory publication. The solicitor's general recollection was that Ms Lamb said that she had spoken to police about the respondent because the respondent had been harassing her and contacting people around her. Ms Lamb told the solicitor that the respondent had caused her difficulties in her job, and that she had lost her job. Ms Lamb said she had observed an incident between the respondent and one of his children and was concerned for the welfare of his children because he acted in a coercive and controlling manner towards her – [40]-[41] of the judgment below.

[27] The trial judge found that the publication to the police officer was malicious. His reasoning was:

> "[58] Should I be wrong about my finding that the defendant has not established the defence [of qualified privilege] to the requisite standard, I have assessed the evidence such that, in my view, the defence of common law qualified

privilege has been defeated by proof that the defendant was actuated by malice in publishing the matters complained of. I do so acknowledging that the onus of proving malice is not an easy one to discharge. The reasonable inference to be drawn, given the defendant elected not to give evidence, is that she acted shortly after the relationship between the two imploded because she was angry at the plaintiff having contacted [her de facto] and that she wanted to restore her position with him. I accept that she did not act from any concern for her own position or that of the plaintiff's children particularly in circumstances where the evidence has demonstrated that:

(a) when Senior Constable Trevor asked the defendant for evidence of the plaintiff's 'harassment', her response was that she had deleted the relevant text messages;

(b) her response to being concerned about the welfare of the plaintiff's children was not to complain to the police (even though she evidently had no reticence when it came to calling them about other matters) or some other authority charged with protecting children, but to call a solicitor; and,

(c) on her case she terminated the relationship weeks before, yet her concern for the children had not arisen until after the telephone call between [her de facto] and the plaintiff occurred.

[59] I accept that the interference of the defendant in the family law proceeding was, as the plaintiff's representatives submitted, 'as officious as it was cruel'. There could be no other reason for it other than to injure the plaintiff.

[60] Additionally, [Ms Lamb's de facto] gave evidence. I accept that he and the defendant were in a de facto relationship … from 2015 until around February/March 2020 … He said that he spoke to the plaintiff on the morning of 19 March 2020 during which the plaintiff told him that he had been in a relationship with the defendant since August or September 2019 … the defendant maintained that 'it is not the defendant's understanding that their relationship was a de facto relationship.' Yet [Ms Lamb's de facto] said in his evidence that there had been 'no change'

> in the status of the relationship between its commencement and as at March 2020. Following the conversation between [Ms Lamb's de facto] and the plaintiff, [Ms Lamb's de facto] asked the defendant to stay at a friend's house. I find that evidence credible and plausible.
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> [61] I therefore accept, consistent with the plaintiff's case, that these features allow me to infer that the defendant made the publications to retrieve her position with [her de facto] and to lash out at the plaintiff. That was, in my view, the dominant motivation for the publications. It was done for a relevant improper motive. The defendant was driven by desire for revenge. Common law qualified privilege does not apply."

[28] There are a number of difficulties with the primary judge's finding of malice. First, the primary judge had found only one defamatory publication. The focussed question for his attention was whether or not malice defeated an otherwise available defence of qualified privilege in relation to <u>that</u> publication. In *Roberts v Bass*[16] Gleeson CJ said, "The kind of malice that defeats a defence of qualified privilege at common law is bound up with the nature of the occasion that gives rise to the privilege".

[29] It was permissible for the primary judge to look at Ms Lamb's behaviour in contacting the respondent's wife's legal representatives in deciding whether or not her publication to the police officer was actuated by malice. A logical inference could be drawn that if Ms Lamb acted maliciously in communicating with the solicitors, that bore upon her motives in communicating with the police officer, particularly when the communications were on the same day, or within a day of each other, and where the communication to the solicitors referred to the communication with the police officer.

[30] Having said that, the communication to the police officer and the communication to the respondent's wife's solicitors were two different communications and there may well have been a different motive for each. Further, where what was actually communicated to the solicitor was not proved with any precision, some caution had to be exercised.

[31] The trial judge found that, in contacting the respondent's solicitors, Ms Lamb did not act from any concern for her own position or that of the respondent's children, but because she was angry with the respondent, who had contacted her de facto partner that day and because she wanted to restore her position with her de facto partner. I cannot see a firm foundation in the

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16 (2002) 212 CLR 1, [8].

evidence for coming to that conclusion. There was no direct evidence, and the evidence from which inferences could be drawn was limited:

- There was no direct evidence that Ms Lamb wished to restore her position with her de facto. She did not give evidence; the de facto did give evidence, but did not give evidence of this. A large number of text messages between the two were in evidence. As might be expected in the circumstances, many attitudes are evidenced. I do not regard the text messages as any reliable evidence of a disposition on the part of Ms Lamb. In any case, it is hard to see how injuring the respondent would restore Ms Lamb's position with her de facto (even allowing that people act irrationally in these circumstances).

- It is difficult to know what factual finding the primary judge made at [58](a). Was it that there never were any text messages which illustrated harassment of Ms Lamb; that Ms Lamb had received harassing texts but deleted them, or that Ms Lamb had received harassing texts but was not prepared to show them to the police officer? I cannot see that the first of these findings could be made on the evidence, although had it been, it may have supported proof of malice. If the finding was in terms of the second or third postulated, I cannot see that it could have supported a finding of malice.

- As to the reasoning at [58](b) and [58](c), there are many reasons why someone in a continuing relationship does not complain to police or lawyers about behaviour they observe in their partner. The most obvious is that should their complaint ever be revealed, it would destroy the relationship. It is not necessarily, therefore, an indication of lack of genuine concern that Ms Lamb did not complain about the respondent to police, or to his wife's solicitors, during the currency of their relationship. There may be some incongruity in Ms Lamb's complaint to police about concerns she held for herself and her family, and to the respondent's wife's solicitors about concerns she held for his children. It may be an indicator that she intended to hurt the respondent.

- The fact that the respondent contacted Ms Lamb's de facto on the same day she contacted the police officer and the same day (or the day before) she contacted the respondent's wife's solicitors, might well indicate that the three communications are all connected. One available inference is that Ms Lamb was angry and vengeful.

[32] In making his findings at [58] of the judgment below, the primary judge acknowledged that they were made on inference, rather than on direct evidence. He described them as, "the reasonable

inference[s] to be drawn, given the defendant elected not to give evidence …". Ms Lamb did not give evidence, and she did not tender any explanation as to why she did not give evidence. Her motivations, and particularly whether or not they were predominantly malicious, were matters peculiarly within her own knowledge. The rule in *Jones v Dunkel* meant that the judge could infer that she had nothing to say which assisted her case.

[33] In *Roberts v Bass*, Gaudron, McHugh and Gummow JJ discussed malice in the context of the defence of qualified privilege. They said:

> "… malice means a motive for, or a purpose of, defaming the plaintiff that is inconsistent with the duty or interest that protects the occasion of the publication. It is the motive or purpose for which the occasion is used that is ultimately decisive …" – [79].
>
> "… honesty of purpose is presumed in favour of the defendant. It is for the plaintiff to prove that the defendant did not use the occasion honestly or, more accurately, for a proper purpose. …
>
> Because honesty [of purpose] is presumed, the plaintiff has the onus of negativing it. That is to say, the plaintiff must prove that the defendant acted dishonestly by not using the occasion for its proper purpose. …" – [96]-[97].

[34] Here it was necessary for the respondent to prove to a high standard of cogency that the dominant motive for Ms Lamb's communicating with the police officer was a desire to injure him.[17] The primary judge noted that "the onus of proving malice is not an easy one to discharge" – [58]. In *Murray v Raynor*, the New South Wales Court of Appeal said, "Malice is a serious matter and the principles set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 … apply to such a finding; *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 …".[18] In my view there was not sufficient evidence before the primary judge to draw an inference that the predominant motive of Ms Lamb in communicating the defamatory material to the police officer was malice.

Triviality

[35] Although the determinations I have already made are sufficient to dispose of this appeal, I go on to consider that part of the appeal which dealt with a defence pursuant to s 33 of the *Defamation Act 2005* (Qld). Section 33 provided:

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17 *Roberts v Bass*, above, [10], [75] and [104].

18 [2019] NSWCA 274, [62]; *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42, 49.

> "It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."[19]

[36] It was accepted below and on this appeal that the phrase "any harm" in that section was limited to reputational harm and did not extend to hurt feelings.[20]

[37] The primary judge found that the defence of triviality did not apply. He reasoned this way:

> "[67] Regarding the first publication, because Senior Constable Trevor did not know the plaintiff at the time of the first publication, his opinion of him could only be negatively affected. The plaintiff gave evidence that certainly at the relevant period, he travelled to Sydney often and spent a considerable amount of time in New South Wales on business. Despite the confined extent of the publication, the plaintiff was still identified to Senior Constable Trevor, who spoke with the plaintiff about the defendant's complaint. There was therefore harm, or at the very least a prospect of harm, to the plaintiff's reputation. I maintain this view despite the COP's report recording that, following its investigation of the defendant's complaint, police held 'nil' 'fears at [that] stage' about the plaintiff. His reputation was not vindicated. The point is the plaintiff was identifiable to Senior Constable Trevor and the records held by his employer, which was likely to result in reputational harm, no matter how brief."

[38] The police officer gave evidence that he took information from Ms Lamb, and then went back to the police station in order to log it on the computer. The entry the police officer made on the computer was that after having received information from Ms Lamb he contacted the respondent by phone and advised him not to contact Ms Lamb under any circumstances. He recorded that the respondent "seemed shocked by police intervention … [The respondent] agreed that if [Ms Lamb] no longer wanted any contact, [the respondent] would respect that and not contact her". The officer recorded that the respondent was spoken to about the possibility of an AVO in the future should he continue to contact Ms Lamb when contact was unwanted. He recorded, "Fears held by police – nil at this stage" and "Domestic violence – no offence".

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19 This law has now changed.

20 *Smith v Lucht* [2017] 2 Qd R 489, [96]ff.

[39] Thus, I do not think that there was any compelling evidence that the police officer thought less of the respondent than he did before the complaint. However, this is not the relevant enquiry for two reasons. The time to judge whether or not harm to reputation has been caused is the time of publication, and the enquiry is not whether harm to reputation did actually ensue, rather whether or not harm to reputation was likely.[21]

[40] Furthermore, I think that what the police officer actually thought of the respondent at the time of publication is irrelevant. The enquiry is to harm to the respondent's reputation. In my view, there was harm to the respondent's reputation by reason of the complaint. From the time of the complaint, his reputation included that a complaint to police had been made about his behaviour. That is a serious enough thing that I do not think it can be said that, "The circumstances of publication were such that the plaintiff was unlikely to sustain any harm". An example given in *Morosi v Mirror Newspapers Ltd*[22] makes the point by way of comparison: "Section 13 [an analogue to s 33] seems to be intended to provide a defence to trivial actions for defamation. It would be particularly applicable to publications of limited extent, as, for example, where a slightly defamatory statement is made in jocular circumstances to a few people in a private home."

[41] Here, although the publication was certainly limited in extent – one person – it was made to that person in their capacity as a member of the police force in serious circumstances. In conclusion, while my reasons differ from those given by the trial judge, I cannot see that the triviality defence was made out having regard to the circumstances of publication in this case.

Orders

[42] I would order:

1. Allow the application for leave to appeal.

2. Allow the appeal, set aside the order of the primary judge made on 23 September 2022, and in lieu thereof order judgment for the defendant.

3. The respondent is to pay the appellant's costs of this appeal.

[43] As to costs below, I would direct:

4. The appellant is to file and serve written submissions as to costs of the District Court proceeding (no more than five pages) and affidavit material (if any) within 14 days of the date of this judgment.

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21 *Smith v Lucht* (above), [32]ff, and the authorities cited there.

22 [1977] 2 NSWLR 749, 799.

5. The respondent is to file and serve written submissions as to costs of the District Court proceeding (no more than five pages) and affidavit material (if any) within 14 days thereafter.

6. The appropriate order as to costs is be determined on the papers.

[44] **FLANAGAN JA:** I agree with Dalton JA.