IN THE HIGH COURT OF AUSTRALIA No. S 319 of 2011

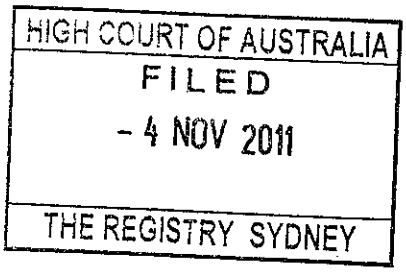
SYDNEY REGISTRY

BETWEEN:

TONY PAPCONSTUNTINOS

Appellant

and



PETER HOLMES A COURT

Respondent

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RESPONDENT'S SUBMISSIONS

PART I: Internet certification

1. These submissions are suitable for publication on the internet.

Part II: Issues on appeal

2. This appeal concerns the defence of common law qualified privilege which the Court of Appeal upheld, reversing the trial judge's verdict in favour of the appellant.

3. This appeal involves two related issues:

   (a) A substantive question of the law of qualified privilege at common law and its application. Specifically, when the defendant has no "duty" to publish nor is answering a request for information, does he or she have to establish a "pressing need" or is that matter merely a sufficient, but not essential basis for finding the defence established?

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   (b) The proper approach of subordinate courts in the judicial hierarchy to dissenting

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judgments of this Court. Here, the Court of Appeal, on three separate occasions,[1] preferred a dissenting judgment of one member of this Court (McHugh J) and did so on the basis that his Honour was dissenting on the facts only, when his Honour plainly disavowed the reasoning of the majority in strong terms. The respondent's submission is that the Court of Appeal was wrong (in the earlier cases) to prefer McHugh J in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, but now has accepted the correct approach. That is, that the judgments of Gleeson CJ, Hayne and Heydon JJ and of Gummow J in *Bashford* accurately state the common law of Australia and the Court of Appeal was correct in this case for the reasons given in the respective judgments.

4. There is a subsidiary issue, that is, whether in the circumstances of this case, the fact that the respondent had first become aware of the alleged conduct of the appellant's son some time before the date of the communication, meant that the occasion of the communication was not privileged or that the conveying of this information was outside any occasion of privilege.

5. The respondent submits that in respect of all issues the Court of Appeal was correct for the reasons respectively given by their Honours.

PART III: Section 78B Notice

6. There is no need for a section 78B notice.

PART IV: Material facts

7. The facts set out in Part V of the appellant's submissions ('AS') are correct but incomplete as to one matter referred to at AS [11]. It was Mr Ferguson's evidence (the recipient of the letter from the respondent dated 17 March 2006), that he left a number of telephone messages with the respondent after receiving his letter on Friday 17 March, but was not contacted by the respondent that day or over the weekend (the final vote taking place on the Sunday). The appellant's submissions implicitly suggest that the respondent received and ignored those messages. However, it was never put in cross examination to the respondent that he received any such messages from Mr

[1] *Goyan v Motyka* [2008] NSWCA 28; *Lindholt v Hyer* (2008) 251 ALR 514 and *Bennette v Cohen* [2009] NSWCA 60

Ferguson, let alone that he ignored them.[2] No such inference is available given the conduct of the case below, especially as this was only two days before the date of the vote and the respondent was busy conducting 'a carefully planned campaign to promote the 'yes' vote'.[3]

PART V: Applicable statutory provisions

8. There are no relevant statutory provisions.

PART VI: Respondent's argument

A Ambit of the appeal - Imputation (a)

9. During oral submissions at the Special Leave application, the appellant's counsel was asked by her Honour Crennan J, whether the 'pressing need' point was confined to imputations (b) and (c) and Mr Tobin responded that it was.[4] However, Mr Tobin went on to say: *'The other question though with regard to the misleading* [imputation] *is, even then on the facts, what time was given to Mr Ferguson to react?'* Although the appellant seems to be submitting here that Mr Ferguson had no time to properly investigate the misleading allegation before the vote,[5] there is no ground of appeal referrable to such a submission,[6] nor is there any submission in AS that the Court of Appeal erred in finding that imputation (a) was published on an occasion of qualified privilege.[7]

10. On this basis, the respondent approaches the submissions in reply on the basis that imputation (a) was conveyed on an occasion of qualified privilege and the appeal is limited to imputations (b) and (c). This means that if the appellant is successful in his appeal, the matter would need to be remitted back to the trial judge to re-assess damages (in respect of those imputations ultimately succeeded upon by the appellant)

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[2] See *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370 per Gibbs J –'If it had been intended to suggest that she was not speaking the truth she should have been cross examined on this matter so that she might have had an opportunity of explanation'

[3] Primary judgment [2009] NSWSC 903 at [4]

[4] [2011] HCA Trans 235 (2 September 2011) at the bottom of page 5 of 10

[5] a point raised in the primary judgment at [71] and later addressed by McColl JA at [143]

[6] save possibly for ground 5 which simply says the Court of Appeal erred in finding reciprocity of interest existed

[7] Findings to this effect are at [9] and [10] per Allsop P and [141] per McColl JA. In fact at AS [59] the appellant emphasises that the corruption allegations were unconnected with the misleading conduct allegation at imputation (a) implying that this imputation was conveyed upon a privileged occasion

on the basis that damages were originally awarded as one total sum without allocation against each individual imputation.

B Correct analysis of the law by the Court of Appeal

11. The Court of Appeal correctly set out the principles relating to the notion of duty and interest and the necessary reciprocity of those interests. The key points are:

(a) regard must be had to all circumstances; [8]

(b) 'all circumstances' would include the fact that it was a voluntary communication;[9] which was *'relevant but not decisive'*; [10]

(c) what was 'fairly warranted' is a value judgment of a contemporaneous social question which should be made by reference to all circumstances; [11]

(d) there is no sharp demarcation separating the concepts of duty and interest; [12]

(e) reciprocity of interest or community of interest can mean *'any legitimate object for the exercise of human faculties pursued by several persons in association with one another'*; [13]

(f) interest means '*an interest in the subject matter to which the communication is relevant*;' [14]

(g) the interest *'must be definite. It may be direct or indirect, but it must not be vague or unsubstantial'*; [15]

(h) interest *'is not used in any technical sense. It is used in the broadest possible sense... as a matter of substance apart from its mere quality as news'*; [16]

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[8] at [5] per Allsop P
[9] [5] per Allsop P , [12] per Giles JA and [15] per Tobias JA
[10] at [18] per Tobias JA
[11] [10] per Allsop P
[12] at [83] per McColl JA
[13] at [83], per McColl JA citing Griffith CJ in *Howe* at 368-370)
[14] Ibid
[15] at [84] per McColl JA citing O'Connor J in *Howe* at 377
[16] at [85] per McColl JA citing Higgins J in *Howe* at 396

(i) reciprocity of interest is essential and as such ordinarily the defence only lies in relation to limited publications; [17]

(j) if published in protection of an interest, the corresponding duty or interest in the recipient must be broadly interpreted.[18]

C Imputations (b) and (c) were published on an occasion of qualified privilege

12. When all circumstances are considered (including the fact that it was made with an honest belief as to its truth and without any improper motive to do so), there could be little doubt that the respondent had an interest in conveying information concerning the appellant's son and the possible involvement of the appellant in that conduct.

13. Even though the communication may be characterised as voluntary, that fact, as with *Howe & McColough v Lees,*[19] *'required no different answer'*.[20]

14. The respondent submits that on any analysis, imputations (b) and (c) were published on an occasion of qualified privilege and would have been privileged even absent the material giving rise to imputation (a).

15. Alternatively, the communication may be analysed within the context of all three imputations (which appears to be the approach of the Court of Appeal). On this basis, the communication was a request for the appellant's employer to intervene immediately to stop the appellant spreading misinformation about the proposal. The suggested reason for the spreading of misinformation was the possible corrupt conduct alluded to (there is no argument on appeal that Mr Ferguson did not have an interest in knowing about the potential corrupt conduct of his employee).

16. In other words, as emphasised by McColl JA at [144], the two allegations were inextricably linked as it was *'the latter which, in the* [respondent's] *mind, explained the former'*. Also as stated by Allsop P at [9]: *'the interest in the sending of the matter*

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[17] at [92] per McColl JA
[18] at [93] per McColl JA
[19] (1910) 11 CLR 361
[20] *Bashford* per Gleeson CJ, Hayne and Heydon JJ at [25]. Also McColl JA remarked at [86] Court of Appeal judgment, that each of the cases referred to by Higgins J in *Howe* at page 396, involved voluntary communications

complained of was the real possibility or expectation that doing so would bring about the intervention of Mr Ferguson or create circumstances to make it more likely that the intervention of Mr Ferguson would be brought about in order to stop Mr Papaconstuntinos ringing and contacting people.'

17. It is therefore incorrect to separate imputations (b) and (c) from (a) and apply a separate test of 'reasonable necessity' with its invariable requirement of pressing need, to the latter two imputations within a vacuum. That a publication may give rise to differing defamatory imputations does not mean that each should be considered outside the full context of the publication as a whole in order to determine whether they were conveyed upon an occasion of privilege.

18. Further, if there is an issue as to whether any part of the publication should be outside the occasion, then this becomes an issue of *relevance* to the occasion ie whether that part of the publication was germane to the occasion itself and not whether each imputation can independently pass a test of reasonable necessity.

D Relevance

19. Qualified privilege does not extend to *'extraneous matter which the defendant may have made at the same time'* as *'it gives no protection to irrelevant libels introduced into the same communication'*.[21] That is, whether the alleged extraneous material is *'something beyond what was germane and reasonably appropriate to the occasion'*.[22] or *'unconnected with and irrelevant to the main statement which is ex hypothesi privileged'*.[23]

20. It is of course the respondent's submission that the occasion of privilege incorporates or encompasses the *whole* of the communication and thereby, all three of the imputations found to be conveyed by it. However, even if it could be argued (after considering all circumstances) that the material giving rise to the second and third imputations (corruption allegations) would not *on their own* give rise to a privileged occasion, they must inexorably be part of the purpose for or the reasons behind the

[21] *Adam v Ward* [1917] AC 309 at 318 per Lord Finlay
[22] *Adam v Ward* at 321 per Earl Loreburn (cited with approval in *Cush v Dillon* (2011) 279 ALR 631at [19] per French CJ, Crennan and Kiefel JJ
[23] *Adam v Ward* at 327 per Lord Dunedin (a summary of subsequent authorities on relevance may be found in *Megna v Marshall* [2010] NSWSC 686 at [72] to [86] per Simpson J)

communication, as they seek to throw light on the possible motive for the appellant's recent conduct. The respondent is still therefore *'restricting himself to a communication which is capable of serving the purpose of the occasion and is made with no other object than that of serving that purpose'*.[24]

21. Although no substantial argument is put by the appellant in his submissions on relevance to the occasion,[25] there can be little doubt that, even if it could be argued, that if not a primary part of the actual occasion, the material giving rise to the second and third imputations was so closely connected to be sufficiently relevant to the privileged occasion.

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E The appellant's argument –volunteers and pressing need

22. The appellant appears to rely upon two propositions to support McHugh J's statement that ordinarily, a volunteered statement will not be privileged in the absence of pressing need and thus argue that imputations (b) and (c) were not published under privilege: [26]

(a) it is a condition of the defence of common law qualified privilege where a defamatory communication is made in defence of the defendant's own personal interests, that the communication must have been *'reasonably necessary'* to protect those interests (AS [2]). Thus the appellant argues that if a defendant
20 does not pass the test of reasonable necessity, he or she does not have the requisite 'interest' (reciprocal with that of the recipient);

(b) if a communication is made voluntarily, to satisfy the above test of reasonable necessity, there must be a *'pressing need'* to make the communication (AS [2]);

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[24] *Mowlds v Fergusson* (1939) 40 SR (NSW) 311 at 318 per Jordan CJ, cited with approval by McHugh J in *Stephens v West Australian Newspapers* [1994] 182 CLR 211 at 261

[25] save to simply say at AS [58] (c) that the corruption allegations were *'totally unconnected with the misleading conduct allegation in imputation (a)'*

[26] See paragraph [10] above - the appeal is apparently limited to these imputations

E1 Reasonable necessity (appellant)

23. The appellant relies upon a number of authorities to show use of 'language of necessity' including:

(a) an interpretation of the expression *'fairly warranted by any reasonable occasion or exigency'* by Parke B in *Toogood v Spyring;* [27]

(b) the statement by Lord Macnaghten in *Macintosh v Dun* [28] that communications made in the legitimate defence of a person's own interests may be privileged;

(c) statements by Barton ACJ in *Norton v Hoare (No1)* [29] that *'the honest repulse by defamatory matter ...stands on the same ground as the reasonably necessary return of physical blows in self defence against aggression.'* and by Isaacs, Gavan Duffy and Rich JJ that '*in defence of property an assault on the person or property of another may be justified if necessary for the protection of the defendant's property'* which is based on the same considerations formulated in *Toogood v Spyring;*

(d) the majority judgments of *Guise v Kouvelis* [30] which the appellant asserts is authority for the proposition that circumstances must *necessitate* publication of the defamatory matter;

(e) *Brown v Croome* [31] which is relied upon by the appellant as adopting a requirement of necessity;

E2 Pressing Need required for voluntary statements (appellant)

24. The appellant argues at AS [55], that where a publication is voluntary (and made to protect a personal interest), it should not be protected unless it was made by reason of imminent or serious irreparable harm or an absence of other effective methods of defence. This was the minority view of McHugh J and the appellant also argues that as

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[27] (1834) 1 CM&R 181 at 193
[28] (1908) 6 CLR 303 at 305
[29] (1913) 17 CLR 310 at 318
[30] (1947) 74 CLR 102
[31] (1817) 2 Stark 297; 171 ER 652

Bashford was a *duty* and not an *interest* case, nothing stated by the majority in that case casts any doubt on this statement.

F Response to appellant's submissions

25. When each of the authorities relied upon is properly analysed, it is clear that the appellant's argument on the use of 'language of necessity' in those cases, is based upon extracts which are taken out of context and do not stand for the propositions contended for.

F1 Reasonable necessity (respondent)

(a) *'fairly warranted by any reasonable occasion or exigency'.*

26. These words by Parke B in *Toogood v Spyring* are part of a sentence which continues: '*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'*. The concluding words emphasise the intended breadth of the defence so that there are no restrictions or attempts to narrow or limit the ambit of the defence.

27. This extract is invariably adopted as the starting point in judgments where the defence is relied upon. The reason for this is that the words encapsulate briefly and concisely, the real essence of the defence whilst remaining '*at a very high level of abstraction and generality'*.[32] By being expressed in such broad terms the defence is '*flexible enough to be adapted from time to time to the varying conditions of society'*.[33] Further, *'new habits of life may create unexpected combinations of circumstances which though they differ from well know circumstances of a privileged occasion, may none the less fall well within the plain yet flexible language of the definition'*.[34]

28. In *Bashford* at [10], the majority judgment emphasised this:

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[32] per Gleeson CJ, Hayne and Heydon JJ *in Bashford* at [10]
[33] *Stephens v West Australian Newspapers Ltd* [1993-94] 182 CLR 211 at 240 per Brennan J
[34] *London Association for the Protection of Trade v Greenlands Ltd* (1916) 2 AC 15 at 22 (quoted in *Guise* by Dixon J at 121)

'When it is recognised, as it must be, that "the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact"[35], it is clear that in order to apply the principles, a court must "make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication".[36]

29. An added condition of 'reasonable necessity' narrows and qualifies the meaning of the expression 'interest', where previously it has not been understood '*in any technical sense,*' but in *'the broadest popular sense'*.[37] In other words, the only requirement is that it be of '*such a kind that it was desirable as a matter of public policy, in the general interests of the whole community of New South Wales, that it should be made with impunity, notwithstanding that it was defamatory of a third party*'.[38]

30. An interpretation which necessarily restricts this generality by imposing a condition of 'reasonable necessity,' cuts across a principle which has, for at least a two centuries, provided a flexible balance between freedom of speech and protection of reputation by virtue of the ability of courts to consider all relevant circumstances to determine whether the communication in question should be protected for the convenience and welfare of society.[39]

31. There is no such restriction and there is no requirement or need to impose such a restriction within the law relating to qualified privilege.

(b) Macintosh v Dun - communications made in the legitimate defence of a person's own interests may be privileged

32. In this case,[40] the Privy Council held that a credit report from a mercantile agency obtained for a fee, was not the type of communication which should be protected for

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[35] Footnote 50 - *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 22
[36] Footnote 51 – *Guise v Kouvelis* (1947) 74 CLR 102 at 116, per Dixon J
[37] *Howe & McCulough v Lees* [1910] 11 CLR 361 at 398 per Higgins J and quoted in *Bashford* at [148] per Gummow J
[38] *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363.
[39] See *Stephens* ibid at 238 per Brennan J
[40] *Macintosh v Dun* (1908) 6 CLR 303

the common convenience of society.[41] The appellant states at AS [40], that *'the law has only recognised the privilege in cases where the communication is 'made in the legitimate defence of a person's own interest'*. However, the quoted extract from *Macintosh* [42] is not so limited and simply provides an example of where a publication would be regarded as clearly privileged and goes on to clarify that other situations (for example where information is volunteered) may require closer scrutiny:

> 'Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be 'recognized by English people of ordinary intelligence and moral principle'... It cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance'.

33. In fact, this confirms that in circumstances where a publication is volunteered, it is a factor to be taken into consideration when determining whether there exists an occasion of privilege.

(c) *Norton v Hoare (No1)* [43]

34. *Norton v Hoare (No 1)* was one of the earliest 'reply to attack' cases and pre-dated *Adam v Ward.*[44] The facts involved a publication in a newspaper in reply to an attack by another newspaper a week earlier. The language of reasonable necessity arose within the context of whether there was any right for a defendant to '*repel by counter-publication a libellous attack upon his own character*:' [45] In such a situation an analogy was drawn with self-defence in criminal law:

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[41] In *Bashford*, Kirby J said at [189] that this view does not represent the common law of Australia today and should be treated as overruled
[42] per Lord Macnaghten at 305
[43] [1913] 17 CLR 310
[44] [1917] AC 309
[45] [1913] 17 CLR 310 at 318, per Barton ACJ

> 'That, I think, stems on the same ground as the reasonably necessary return of physical blows himself defence against aggression, and the degree of protection given the limited in a closely analogous way'.[46]

35. Reply to attack cases involve very different considerations to orthodox duty/interest communications and factors relevant to that area of law should not be exported or treated as if they are universal principles within the law relating to qualified privilege. The key difference between reply to attack cases and other types of communication is that in cases of reply to attack:

> 'there is no question of communities of interest, or of corresponding interest, as in other cases of privilege. The defendant is allowed to defend himself in the same field in which the plaintiff has assailed him – if the attack is to the press, then again the press may be used in answer.' [47]

36. Similarly, the extract at AS [41], from the joint judgment of Isaacs, Gavan Duffy and Rich JJ countenanced a reply to attack where it was necessary for the protection of the defendant's property. Nothing in either of the judgments relied upon by the appellant is authority for the proposition that a test of 'reasonable necessity' must be applied wherever personal interests are at stake.

(d) *Guise v Kouvelis* [48]

37. As stated by Latham CJ in the extract quoted at AS [51], the defendant was not protecting a personal interest at all by his outburst and for this reason, Latham CJ considered that he had alternative means of making a complaint, for example, by reporting the suspected conduct to the club's committee. There was no application of any test of reasonable necessity, but a conclusion that where a personal interest was not being protected, then communication in that manner to all members within earshot was not warranted and not therefore privileged.

38. The appellant correctly states that Dixon J dissented and it is that dissenting judgment which has received the most attention in later cases involving qualified privilege [49]

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[46] Ibid
[47] Ibid
[48] (1947) 74 CLR 102

and '*commands acceptance*'.[50] Dixon J confirmed that *'the entire transaction must be considered in ascertaining whether the occasion was privileged*'[51] and also said:

> 'In the case before us the first and perhaps only question is whether during the game at the card table an occasion of privilege arose allowing the defendant to state his belief or opinion as to the propriety and fairness of the plaintiffs play. If so, then unless the words complained of was so foreign to the occasion that they must be held extraneous or irrelevant, the rest is all matter for the jury'. [52]

39. Dixon J expressly warned against the application of specific tests and formulas to determine duty or interest:

> 'the reduction of matters of privilege to formulas of duty and interest and of corresponding interest or duty have tended to the introduction of dialectical tests in a matter essentially of doctrine and, moreover, a matter covered by many decided cases which do not always respond easily to the formulas'.[53]

(e) *Brown v Croome* [54]

40. This case is footnoted in Newell as an authority for the extract set out at AS [47] to support the proposition that a communication is privileged when necessary to protect one's own interests. In fact, it has nothing to do with reasonable necessity. First, the extract from Newell does not say that a communication to protect a personal interest is *only* privileged where necessary. Secondly, the issue in that case was quite different. It was whether a publication to the general public in a newspaper was warranted and therefore such a wide dissemination would only be protected where it was necessary to do so. Lord Ellenborough also remarked:

> 'No doubt it was competent to the petitioning creditors, and to the solicitor under the commission, to convene the creditors for the purpose of consulting as to the course which it might be advisable to pursue after the petition had been preferred, in order to

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[49] *Bashford* at [10], [22] and [139], *Cush v Dillon* (2011) 279 ALR 631 at [26] and [52], *Aktas v Westpac* (2010) 241 CLR 79 at [22], [100] and [108], *Roberts v Bass* (2002) 212 CLR 1 at [218], *Bellino v ABC* (1995/96) 185 CLR 183 at 204
[50] per McColl JA at [82] Court of Appeal judgment
[51] *Guise* at 119
[52] Ibid at 118
[53] *Guise* at 125
[54] (1817) 2 Stark 297; 171 ER 652

> supersede the commission. The question is, whether the defendant was justified in publishing this advertisement to the world' [55]

41. The so called test of reasonable necessity is not therefore, as stated by the appellant at AS [52], supported by '*both principle and authority*'.

F2 Pressing need as a requirement for voluntary statements (respondent)

42. As acknowledged by the appellant at AS [53], pressing need can only be supported as a corollary of the requirement for reasonable necessity.[56] That is, the appellant says, it is difficult to see how reasonable necessity could be achieved absent pressing need for voluntary statements (AS [55]).

41. That pressing need is *not* established principle is consistent with the language adopted by McHugh J at [73]-[79] of *Bashford*. The focus of those passages is upon voluntary publications per se, concluding at [77] that in the absence of immediate harm to a person or property, voluntary publications are *unlikely* to be protected by qualified privilege. Pressing need is but one of a number of exceptions at [73] to this conclusion. Further, the use of words such as '*ordinarily*', '*generally*' and '*in most cases*' in [73] illustrates that this is an example of a factor to be taken into account when considering all relevant circumstances of the case and not a clear statement of principle which should be invariably applied to any voluntary communication.

42. The joint judgment in *Bashford* expressly referred to the notion of voluntary publications by confirming that whether or not a communication was made voluntarily made no difference to the test to be applied in determining reciprocity of duty or interest between maker and recipient.[57] The example provided was *Howe & McColough v Lees* [58] where not only was the publication voluntary, but there was no pressing need to make it at the time. Higgins J said in *Howe* at 396:

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[55] ibid at 653
[56] or as articulated in a question by Crennan J at the special leave application; *'an invariable requirement in relation to reasonable necessity'*
[57] per Gleeson CJ, Hayne and Heydon JJ at [25]
[58] (1910) 11 CLR 361

> 'It is urged, however, that no dealing was imminent or in contemplation between Lees and any of the other auctioneers. I cannot see why this fact should prevent the communication from being fairly warranted by a reasonable occasion or exigency' The occasion may be reasonable, even if a dealing is not actually proposed'[59]

43. At [4] and [5] of the Court of Appeal judgment, Allsop P characterised the suggested requirement of pressing need for voluntary publications as a 'superadded' requirement or precondition for qualified privilege and concluded that the fact that a statement was volunteered may well be relevant, but only as part of all the circumstances of the publication in order to assess whether the relevant statement was fairly warranted by the occasion. In many cases pressing need *will* be present but there are circumstances where it may not be, yet after consideration of *all* relevant circumstances, that occasion may still enjoy the protection of privilege.

44. The author of Odgers in addressing the issue of volunteered information, placed no conditions upon it save for the need to be made bona fide:

> 'Where the defendant does not stand in any confidential relation to the person interested, it is difficult to define what circumstances will be sufficient to impose on him the duty of volunteering the information. The rule of law applicable to such cases cannot be better expressed than in the following passage: – 'Where a person is so situated that it becomes right in the interests society that he should tell a third person certain facts, then if he bona fide and without malice does tell them, it is a privileged communication' (per Blackburn J in Davies v Snead LR5 QB 611)... But the difficulty is in any given case to determine whether it had all had not become right in the interests of society that the defendant should act as he did. And this is a question rather of social morality then of law.' [60]

45. In other words, the fact that a communication was made voluntarily is a relevant factor, but its influence on the outcome depends on *all* circumstances including contemporary social values as to whether such a communication should be protected in the interests of society. It may therefore be a sufficient criterion, but not a necessary one.

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[59] Also cited by McColl JA at [85] Court of Appeal

[60] *A Digest of the Law of Libel and Slander* –WB Odgers (3rd edition) (1896) at page 238, McColl JA also referred to an extract from the 5th edition of Odgers on volunteered statements at [131] as well as other historical texts at [133] to [141]

46. To overlay a requirement of reasonable necessity (and with it pressing need), would self-evidently place restrictions around a principle of law that has been versatile and flexible enough to move with changing times and circumstances, yet not become weighed down by *'dialectical tests'* or *'formulas'* referred to by Dixon J in *Guise v Kouvelis.*[61]

F3 Previous decisions of the Court of Appeal

47. At AS [57], the appellant places some reliance upon references to pressing need (arising from the dissenting judgment of McHugh J in *Bashford*) in two previous decisions of the Court of Appeal namely *Goyen v Motyka*[62] and *Bennette v Cohen.* [63] With these decisions in mind,[64] the Court of Appeal convened a full bench of five judges. However, on analysis, each of the judges were of the view that in neither of those cases was the issue of voluntary publication and pressing need determinative of the issues in those appeals.[65] Further, with great respect to the members of the Court of Appeal who participated in the decisions mentioned, they should have more appropriately considered the words of the joint judgment in *Bashford*, not those of a dissenting judgment.

48. On this point the respondent suggests it was inappropriate for the Court of Appeal in those previous cases to adopt a dissenting judgment and should, in accordance with the usual principles, have focussed on the words of the judges in the majority.

G Malice not an issue –Ground 6 of the Notice of Appeal

49. In his Notice of Appeal, the appellant states in ground 6 that the Court of Appeal erred in finding that a communication *'made to silence the plaintiff on the eve of a*

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[61] *Guise* at 125
[62] [2008] NSWCA 28
[63] [2009] NSWCA 60
[64] Also *Lindholt v Hyer* (2008) 251 ALR 514 dealt with by McColl JA at [103] of the Court of Appeal judgment
[65] Allsop P at [4], Beazley JA at [11] (who simply agreed with the reasons of McColl JA and additional comments of Allsop P), Giles JA at [12], Tobias JA at [14] to [18] and McColl JA at [102] to [107] . A detailed analysis of those decisions was also undertaken by Simpson J in *Megna v Marshall* [2010] NSWSC 686 at [153] who declined to accept an argument based on pressing need for voluntary communications

decisive vote was fairly warranted'. That was not a finding made in any of the judgments of the Court of Appeal and suggests a motive inconsistent with any privilege. In other words that the respondent was motivated by malice. In fact:

(a) despite a plea by way of reply that the respondent was motivated by express malice by having a dominant motive to discredit the appellant, the finding by the trial judge that the publication of the letter was not motivated by any desire to discredit the appellant was not subject to any appeal; [66]

(b) the appellant also does not contest the finding by the trial judge that the respondent held an honest belief in the truth of what he published and was
10 frank and honest in the evidence he gave the court; [67]

50. There is therefore no basis for this ground of appeal.

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[66] [2009] NSWSC 903 at [97] and [100]
[67] [2009] NSWSC 903 at [76], [77] and [80]