**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA483/2009**
**[2010] NZCA 624**

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| BETWEEN | ERIN A LEIGH<br>Appellant |
| AND | THE ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF ENVIRONMENT<br>First Respondent |
| AND | LINDSAY GOW<br>Second Respondent |

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| Hearing: | 17 June 2010 |
| Court: | William Young P, O'Regan and Ellen France JJ |
| Counsel: | J G Miles QC and J S Langston for Appellant<br>J W Tizard and A J Connor for Respondents |
| Judgment: | 17 December 2010 at 4 pm |

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## JUDGMENT OF THE COURT

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**A The appeal is allowed, to the extent that:**

**(a) the statements made in the Briefing Paper are capable of bearing the defamatory meanings pleaded; and**

**(b) the Oral Statements are capable of bearing the pleaded meaning that the appellant was overly emotional.**

**B The Judge's finding that Article 9 of the Bill of Rights Act 1688 precludes the pleading that the Minister's statements in the House were a republication is upheld.**

**C The strikeout of the cause of action for negligent misstatement is upheld.**

**D** **Paragraph [48] of the amended statement of claim is reinstated by consent.**

**E** **The cross appeal is dismissed.**

**F** **No order as to costs.**

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## REASONS OF THE COURT

(Given by Ellen France J)

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### Introduction

[1] Erin Leigh says that various statements (written and oral) made about her by the Ministry for the Environment (the Ministry) and by Lindsay Gow, the then Deputy Secretary of the Ministry, were defamatory. The statements were made in the context of providing material for the Minister for the Environment in order to

answer Parliamentary Questions. Ms Leigh brought proceedings against the respondents seeking damages for defamation and negligence in relation to the statements. The respondents succeeded in the High Court in striking out some aspects of Ms Leigh's amended claim.[1] Ms Leigh appeals and the respondents cross-appeal.

[2] The appeal raises the following primary issues:

(a) Were the statements capable of bearing the defamatory meanings pleaded?

(b) Can Ms Leigh claim for damage to her reputation resulting from what the Minister said about her in Parliament and subsequent media reporting of what the Minister said?

(c) Are the statements made by the Ministry and Mr Gow covered by absolute privilege?

(d) Did the Ministry owe a duty of care to Ms Leigh in preparing the statements?

[3] In addition, there are some subsidiary issues about aspects of the pleadings.

[4] We will discuss the appeal by reference to these questions but it is first necessary to say something more about the background. We largely adopt Dobson J's description in that respect.[2]

## Factual background

[5] Ms Leigh contracted to the Ministry between July 2005 and May 2006 as a communications advisor in relation to climate change issues. In mid-May 2006, another communications advisor, Clare Curran, was appointed to oversee the content of the communications strategy on which Ms Leigh had been working. This

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1 *Leigh v The Attorney-General* HC Wellington CIV-2008-485-2315, 14 July 2009.
2 At [2]–[8].

appointment resulted in Ms Leigh's abrupt departure from her role. She finished work on 16 May 2006 although the latest of the three contracts under which she performed the work ran until the end of May.

[6] Ms Leigh moved on to other work. However, what had occurred in mid-May 2006 became relevant for present purposes in November 2007. At that point, the then government was coming under fire about the circumstances in which Ms Curran had been employed. Ms Leigh was asked about the events by a reporter. Ms Leigh apparently confirmed that she saw Ms Curran's appointment as politically motivated given Ms Curran's links with the Labour Party and that the hiring of Ms Curran led to Ms Leigh ceasing work. These issues were canvassed in a news item broadcast on TV3 on 21 November 2007.

[7] That same month, questions were asked in Parliament about the circumstances of Ms Curran's appointment. The then Minister for the Environment, the Hon Trevor Mallard, requested information from the Ministry on 21 November 2007 to allow him to respond to further Parliamentary Questions. On 22 November, Mr Gow was asked by the Chief Executive of the Ministry to provide information about Ms Leigh's contract with the Ministry and the circumstances of her departure. Mr Gow prepared a Briefing Paper that day outlining the circumstances.

[8] Ms Leigh says the content of the Briefing Paper is defamatory. This claim founds the first cause of action. She also says this Briefing Paper was presented to the Minister at a meeting on 22 November at which further defamatory statements were made orally (the Oral Statements). This is the basis of the second cause of action.

[9] During Question Time in the House of Representatives on 22 November 2007, the Minister made various criticisms of Ms Leigh and her performance during her time at the Ministry. Ms Leigh says the statements in the House are republications of the defamations in the Briefing Paper and in the Oral Statements, which aggravate the damage suffered as a result of the original defamation.

[10] Ms Leigh also says the Ministry was negligent in not taking due care in the preparation of the Briefing Paper and the Oral Statements. This aspect of her claim is reflected in the third cause of action.

## The judgment in the High Court

[11] The respondents applied to strike out Ms Leigh's claim on a number of grounds. The application was granted in part. Dobson J found that the statements in the Briefing Paper were incapable of bearing the defamatory meanings attributed and struck out the first cause of action.

[12] The Judge also concluded that the Oral Statements were not capable of bearing the pleaded meaning that Ms Leigh was overly emotional. Apart from that, Dobson J said that the Oral Statements could, at least provisionally, bear the defamatory meanings alleged.

[13] Dobson J found that Article 9 of the Bill of Rights precluded the pleading that the Minister's statement amounted to a republication of the Briefing Paper or the Oral Statements.

[14] Finally, the third cause of action was struck out. The Judge found that the relationship between Ms Leigh and the Ministry was not sufficiently proximate to impose a duty of care. In addition, the Judge took the view that policy considerations militated against the imposition of a duty of care.

## Were the statements capable of defamatory meaning?

### *The relevant pleadings*

[15] In her amended statement of claim in relation to the first cause of action, Ms Leigh relies on the content of the Briefing Paper and alleges a number of false and defamatory meanings as follows:

> 27. The Briefing Paper contained the following statements:

(a) "She was responsible for developing a communications work programme for climate change communications. This went through a series of six drafts in late April to early May 2006".

(b) "Around about mid May 2006, the work Erin did apparently received consistent adverse comment from government departments, from senior officials and also from the Minister responsible for climate change (Hon David Parker). Clare Curran was employed from 22 May 2006".

(c) "By 25 May 2006 Clare Curran had initially reviewed the work that Erin Leigh had done, provided advice to the Ministry on it, and indicated desirable changes".

(d) "Erin's contract was due to cease on 31 May 2006. However, she effectively finished work on 15 May. Her invoices show that she came to work for 15 minutes on 16 May 2006. I have been advised that staff reported she appeared to be in a state of concern. She then left the office, never returned and did not complete the term of her contract".

(e) "We have not found any written documentation to date that shows why Erin left suddenly. What appears to be her last formal communication with the Ministry was an invoice, which included the 15 minutes she was in the office on 16 May 2006".

28. The statements contained in the Briefing Paper ("**Written Statements"**) as a whole were false and defamatory of the Plaintiff in that they meant and were intended to mean that:

(a) the Plaintiff was incompetent;

(b) the Plaintiff was irresponsible;

(c) the Plaintiff was overly emotional;

(d) the Plaintiff was not fit to be employed by a Government department, ministry or agency as a professional communications consultant;

(e) the Plaintiff's work had received consistent adverse comment from Government departments, senior officials and from the Minister Responsible for Climate Change Issues as a consequence of her incompetence.

[16] The second cause of action relates to the meeting between the Minister, various officials, and the Minister's staff on 22 November 2007. The relevant pleading is as follows:

51. During the Meeting, the Second Defendant, on behalf of the Ministry, made the following statements or statements which were substantially the same ("**Oral Statements**"):

(a) stated that the Plaintiff was primarily responsible for developing a communications work programme for climate change communications;

(b) stated that [the] Plaintiff was responsible for the "yellow gumboots" project;

(c) stated that the Plaintiff's work had received consistent adverse comment from:

(i) other Government departments;

(ii) senior officials; and

(iii) the Minister responsible for Climate Change Issues.

(d) stated that her work at the Ministry was:

(i) incompetent;

(ii) open for criticism; and

(iii) required numerous changes.

(e) stated that the Plaintiff left:

(i) suddenly;

(ii) irresponsibly; and

(iii) without advising the Ministry of the reasons for leaving.

(f) stated that, on the Plaintiff's last day of work at the Ministry, the Plaintiff:

(i) worked for a total of 15 minutes clearing out her desk; and

(ii) invoiced the Ministry for that 15 minutes.

*The applicable principles*

[17] There is no dispute about the principles applicable to strikeout. The causes of action must be so clearly untenable that they cannot possibly succeed.[3]

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[3] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

[18] In terms of the test as to whether the words are capable of bearing a defamatory meaning the parties referred to a number of authorities.[4] However, the differences between the parties on this aspect are not critical as they are largely matters of emphasis. And we see no basis for taking any approach other than that set out in *New Zealand Magazines Ltd v Hadlee (No 2)*, where Blanchard J put the test in this way:[5]

> ... whether particular words are capable, as a matter of law, of bearing a defamatory meaning is to be determined exclusively by an examination of the words themselves and where an ordinary meaning goes to a jury it will be without further evidence of whether the words would reasonably be understood in a defamatory meaning: *Gatley on Libel and Slander* (8th ed, 1981) para 1316. In deciding whether words are capable of bearing a defamatory meaning the Court examines what meaning is expressly stated therein or can reasonably be inferred without looking at any surrounding material or without knowledge of further facts.

[19] Blanchard J then summarised the relevant principles as follows:[6]

> (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
>
> (b) The reasonable person ... is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
>
> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading ... .
>
> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used ... . The ordinary person has considerable capacity for reading between the lines.
>
> (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. ...
>
> (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the

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4 Mr Miles QC referred to *Jameel v Wall Street Journal Europe SPRL* [2003] EWCA Civ 1694, [2004] EMLR 6 at [9] (suggesting the Judge's role was limited to weeding out cases where the alleged defamatory meaning was "perverse"). He referred also to *Berezovsky v Forbes Inc* [2001] EWCA Civ 1251, [2001] EMLR 45 at [16] and to *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 at [5] and [6]. Mr Tizard preferred the approach in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (HL) at 71 per Lord Bridge of Harwich.

5 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA).

6 At 625 and see also Barker J at 630 and Henry J at 635.

> mode of publication and surrounding circumstances in which they appeared. ...

*This case*

[20] In reaching the view that the words in the Briefing Paper were not capable of bearing the defamatory meaning alleged, Dobson J relied on a number of contextual matters. Essentially, the Judge treated the Minister's request to the Ministry as a neutral factual inquiry with a focus on the circumstances justifying the hiring of Ms Curran.

[21] Dobson J then addressed each of the defamatory meanings pleaded. It is common ground that in this part of analysis the Judge correctly identified the elements of the Briefing Paper potentially giving rise to the alleged defamatory meanings. Where the parties part company is as to the correctness of the contextual matters relied on by the Judge and as to whether or not the Judge has usurped the ultimate fact-finder's function by determining the actual meaning.

[22] We follow the arguments through in terms of each of the defamatory meanings pleaded.

*"The plaintiff was incompetent"*

[23] The relevant elements under this head are as follows: Ms Leigh's work had gone through six drafts; her work received consistent adverse comment at around the time she left; and she departed abruptly in circumstances which were unexplained.

[24] Of these matters, the Judge in essence said they are not factors that will be read as suggesting incompetence but, rather, as reflective of both the complexity and importance of the subject-matter Ms Leigh was working on and of differences in approach to it, to which Ms Leigh has responded by taking a principled stand. It is necessary to assess the Judge's approach in light of the circumstances of the request to the Ministry.

[25] The Ministry was asked on 21 November 2007 to provide information about the basis of Ms Leigh's engagement, her work, and the reasons for her departure. That was after a reporter had spoken with Ms Leigh (on about 19 November) and asked her to confirm allegations that the Ministry had breached normal employment protocol in hiring Ms Curran and that the then Minister for Climate Change, the Hon David Parker, had interfered to ensure Ms Curran's appointment. There had been a television item about this. Further, questions had already been asked of Mr Mallard in the House on 20 November 2007. The questions asked the Minister, amongst other matters, about the fact that the Commissioner for State Services was inquiring into Ms Curran's appointment at the Ministry. This was the context in which the Minister asked for information about Ms Leigh.

[26] Mr Tizard quite rightly emphasises there is no pleading that what was said was false. Nor is there any suggestion in the pleadings that, for example, the request sought "the dirt" on Ms Leigh. Instead, the relevant part of the pleading is that:

> On 21 November 2007, the Ministry was asked by the Right Honourable Trevor Mallard, the Minister for the Environment ("**Minister**"), to inform him of the basis on which the Plaintiff was engaged by the Ministry, the nature of the work she undertook and the reasons why the Plaintiff had terminated her contract in May 2006.

[27] Accordingly, Mr Tizard's submission was that there was no plausible pleaded context to support the alleged defamatory meaning. However, even as pleaded, there is an available contextual analysis from which a rather different picture potentially emerges. On that view, there was something of a political imbroglio developing in the course of which Ms Leigh had been critical of the Government. We add that the particulars of malice as pleaded do provide something of a less neutral context. For example, it is pleaded that the Ministry knew that the statements would be used by the Minister for political purposes, amongst other matters, "to defend allegations of lack of integrity" in the conduct of the relevant Minister. It is also of course possible for the pleadings to be amended in this respect and Mr Miles QC indicated that he may well seek to do that.

[28] Mr Tizard also notes the care taken in the Briefing Paper not to pass judgment, for example, it states that there "apparently" was criticism of Ms Leigh.

But, as in *Hadlee*, what is said is capable of being read as suggesting there is "no smoke without fire" especially when the apparent criticism is tied in to the reported circumstances of her departure. Indeed, the omission of anything favourable to Ms Leigh in the Briefing Paper is potentially very important especially given that she was a senior communications specialist contracted for her experience and expertise.

[29] In any event, it is our view that, even taking a neutral context, the words can still bear the alleged defamatory meaning. The Ministry's response, while ambiguous, to the extent it reflected on Ms Leigh's character was capable of being read against her.

*"The plaintiff was irresponsible"*

[30] The Judge's view was that in the context of a neutral factual inquiry those for whom Ms Leigh was working were left in no doubt as to the reason for her departure. Dobson J said:

> [22] ... Once she had responded negatively to having her work vetted by another consultant/contractor, she was entitled to take the view that there was no point in remaining. ... As I have noted above, the absence of a written explanation for her early departure is not relevant as a reflection on how responsibly she conducted herself at the end of her period with the Ministry. The material reason for that fact being referred to is to report to the Minister that there was no contemporaneous document recording her protest about the circumstances of appointment of Ms Curran which was the topic that had motivated the Minister's request for a report in the first place.

[31] Again, if we take the less neutral context it is possible to interpret the actions surrounding Ms Leigh's departure differently.

[32] Even if the request is treated as a strictly factual inquiry, when the pleaded matters are considered as a whole, it is at least capable of interpretation as irresponsibility. The references to the six drafts, a review by Ms Curran which "indicated desirable changes", and to Ms Leigh responding by packing up and leaving before the end of her contract without any explanation other than to charge for work including the 15 minutes in the office on 16 May can be read in that way. Presumably, for example, a possible inference is that a responsible person would at least have communicated her reasons for leaving. Further, to leave in this unilateral

manner at the time she did just because her personal views clashed with her professional role could be seen as irresponsible.

*"The plaintiff was overly emotional"*

[33] As the Judge said, the main passages which might convey this meaning are the comments that Ms Leigh appeared to be in a "state of concern", and that she left at short notice with her work incomplete and without any written explanation for her actions. This is to be considered within the broader context of her leaving work as a result of advice that Ms Curran was appointed to oversee the content of her work. On this, Dobson J said:

> [24] The passage does not convey an overly emotional reaction. The Briefing Paper is entirely devoid of any judgement or comment that the reaction was excessive or unwarranted. What it does convey is that she was sufficiently concerned at what she had just been told to leave work at short notice in circumstances where her concern was apparently sufficient to be discerned by those observing her at the time. I cannot see that finders of fact would treat this as inferring that the plaintiff was overly emotional. Rather, it conveys an immediate and potentially principled decision not to continue with the assignment in the changed circumstances she had just been appraised of.

[34] Again, this approach is based on the neutral context we have discussed above. If the circumstances of the inquiry are viewed in a less neutral manner, we consider that the statements are capable of supporting the defamatory meaning. On that analysis, the ordinary reasonable person might infer that Ms Leigh's state of concern was an overly emotional response to the fact someone else (Ms Curran) had been brought in to oversee her work.

*"The plaintiff was not fit to be employed by a Government department, Ministry or agency as a professional communications consultant"*

[35] The Judge took the view that the fact work had gone through a series of six drafts did not render Ms Leigh unfit to be employed in a Government department. Dobson J continued:

> [26] The fact that a number of those considering one or more drafts of her work consistently commented adversely on it might, depending upon the context in which such adverse comments were made, suggest that the person

> was not fit to undertake such work. However, here, the context suggests a clash of principles with the Minister wanting a product reflecting a political agenda, and Ms Leigh's work reflecting a different approach. The initiatives to transfer the task to a communications adviser seen as aligned with the Minister's political thinking on the subject strengthens the impression that it was a difference of principle. Without more than the facts specified in the Briefing Paper, the circumstances of such a clash do not infer that a communications adviser of principle is unfit to be employed generally, but rather that the Government's agenda made it inappropriate for her to continue on this assignment.

[36] Our earlier comments about the context apply here. It follows from what we have said in relation to the meanings of alleged incompetency and irresponsibility, that we consider the statements are capable of the defamatory meanings pleaded.

[37] This alleged defamatory meaning overlaps with the final allegation, namely, that "the plaintiff's work had received consistent adverse comment from Government departments, senior officials and from the Minister Responsible for Climate Change Issues as a consequence of her incompetence". The same comments apply.

[38] It follows from our conclusion that the statements in the Briefing Paper are capable of bearing the defamatory meanings pleaded that the Judge's conclusion the Minister's statements were incapable of being a republication of the Briefing Paper cannot stand. It also follows that we do not have to consider the impact of the Chief Executive's apology, which was relied on by Mr Miles. In the apology, the Chief Executive said he had not intended the briefing to reflect on Ms Leigh's professional ability or performance but that the events which followed showed that the briefing could be and was interpreted in this adverse way.

*Were the Oral Statements capable of defamatory meaning?*

[39] The only issue in relation to the Oral Statements is whether the Judge was correct to conclude that the Oral Statements were not capable of being interpreted as meaning that Ms Leigh was overly emotional. In contrast to the other meanings alleged in terms of the Oral Statements, the pleadings relating to the "overly emotional" aspect rely on the same matters as arising from the Briefing Paper. It

follows from what we have said about the Briefing Paper that the Oral Statements were capable of bearing the defamatory meaning pleaded.

## The impact of Article 9

[40] The issue is whether the Judge was right to find that s 13 of the Defamation Act 1992 and Article 9 of the Bill of Rights precluded the pleading that the Minister's statements in the House were a republication. Section 13 provides that proceedings in the House are protected by absolute privilege. Absolute privilege is a reflection of Article 9, which provides that:

> ... freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any Court or place out of Parlyament.

[41] The parties take differing views on what it means to question proceedings. The position taken by Ms Leigh is that Article 9 does not prevent a plaintiff from raising statements in Parliament for the limited purpose of showing the extent of the damage where no allegations of misrepresentation or falsity will be made against the Member. Rather, Mr Miles submits, the reference to the statements made by the Minister in Parliament is simply a link in the chain of republication to show the extent of the damage caused by the original publications.

[42] The respondents say that to use something said in the House as a basis for a legal challenge means to question in terms of Article 9. Mr Tizard argues that Article 9 is in play here because it is inherent in the allegation of republication that the statements made by the Minister were false and defamatory.

[43] What is meant by impeaching or questioning debate in Parliament was considered by the Privy Council in *Prebble v Television New Zealand Ltd*.[7] Mr Prebble, the former Minister for State-Owned Enterprises, sued for defamation in relation to a television programme. He said the programme asserted he secretly conspired with various people to sell state assets on unduly favourable terms in return for donations to the Labour Party.

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[7] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

[44] Television New Zealand denied the meanings alleged but also pleaded, amongst other matters, truth and fair comment. Some of the pleaded particulars referred to speeches in the House and to other proceedings in the House or associated memoranda. The defendant sought therefore to demonstrate truth by relying on things said and acts done in Parliament.

[45] Lord Browne-Wilkinson in delivering the opinion of their Lordships rejected the submission that the principle of comity reflected in Article 9 only operates to prohibit the questioning of statements made in the House in proceedings asserting legal consequences against the maker of the statements for making them. Lord Browne-Wilkinson said that Article 9 also meant that parties to litigation cannot bring into question anything said or done in the House:[8]

> ... by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading.

[46] Their Lordships did make it clear that this did not exclude all references in Court proceedings to what has taken place in the House. In particular, Lord Browne-Wilkinson said there could be no objection to the use of Hansard to "prove what was done and said in Parliament as a matter of history".[9]

[47] In the *Prebble* case, their Lordships concluded the defendant's intention was to rely on matters in the House as part of the alleged conspiracy or its implementation. The pleadings were properly struck out.

[48] We consider that in seeking to rely on republication in the House in this case the plaintiff does question debate in the House in a manner contrary to Article 9. The relevant parts of the pleading strike at the heart of the concept underlying Article 9, explained by Lord Browne-Wilkinson as the need to ensure members can speak freely without fear of later legal consequences.[10] If the Minister's comments could be relied on in the way pleaded, that would potentially have constrained debate

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[8] At 10.
[9] At 11.
[10] At 8.

and also entailed the risk of the court stepping into an area within Parliament's exclusive jurisdiction.

[49] It is true, of course, that the Minister is not directly sued. But it is clear that the most significant consequences for Ms Leigh were directly associated with what the Minister said in the House. More importantly, it is inherent in the allegation that what was said was defamatory that it was false. That is apparent from the pleadings which aver that the Minister's comments "repeated the defamatory sting" of the written and oral statements.

[50] The particular comments by the Minister which are pleaded are as follows:

> (a) "Erin Leigh had repeated competence issues. She had to fix up the piece of work that she was employed to do six times after complaints from senior officials from a number of departments. As a result of that, someone had to come in and fix up that mess. Clare Curran was employed to do that."
>
> (b) "The last record of contact that the Ministry had with Erin Leigh was when she came in, in an agitated state, for a quarter of an hour in order to clear out her desk. It is my understanding that the last non-physical contact was when she sent an invoice to the Ministry for that quarter of an hour."
>
> (c) "Ministers have the right to insist on competent advice. That has been established for a long period of time. When something comes to them six times and is criticised by officials not only from the Ministry for the Environment but from other Government departments, I think that any reasonable chief executive would look for someone who could do the work. When there is someone available to try and fix up the mess who did climate change strategic work for the Australian Liberal Government, I can understand why the Ministry employed her."
>
> (d) "[the Plaintiff] who is a sad person, who had six attempts at doing a piece of work, and who was replaced on that job ... ."

[51] It is inevitable that if the case proceeded on the basis of the current pleadings, there would be some comparison between the written and oral statements and the Minister's comments. This would focus on the extent to which the latter were embellishments. Our approach differs from that of Dobson J in this respect because, in concluding that Article 9 prevented the republication pleading, his Honour proceeded on the basis that a number of the statements were not capable of bearing a defamatory meaning. On the Judge's approach, the differences were more

stark but even on the basis of our view on that first issue, the comparison must involve a challenge to or questioning of what the Minister said.

[52] Another way of demonstrating the potential impact of the pleading is to consider matters from Mr Gow's perspective. He denies that the statements had the alleged defamatory meanings. It is difficult to see how he can maintain that denial without questioning what the Minister said.

[53] It follows from our analysis that we do not see this case as in the same category as *Jennings v Buchanan.*[11] Mr Jennings MP was unsuccessful in seeking to have a claim of defamation against him struck out. He made a statement in the House defamatory of Mr Buchanan. Subsequently, Mr Jennings was interviewed for a newspaper which reported him as saying he did not resile from the claim made in the House.

[54] Their Lordships were influenced in that case by the fact that the claim was founded on the extra-parliamentary publication and not that in the House. Lord Bingham of Cornhill put it in this way:[12]

> ... reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member's behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament. The situation is analogous with that where a member repeats outside the House, in extenso, a statement previously made in the House. The claim will be directed solely to the extra-parliamentary republication, for which the parliamentary record will supply only the text.

[55] If Ms Leigh is entitled to rely on republication by the Minister in Parliament she will, in substance, be challenging what he said in a way which we see as putting the case on the other side of the line from *Jennings v Buchanan*. The claim is accordingly closer on the spectrum to that of *Janssen-Ortho Inc v Amgen Canada Inc*[13] to which Mr Tizard referred us. In that case, the defendants in two radio broadcasts made allegedly defamatory statements about a drug marketed by the plaintiffs. A little later, a member of the House asked a question in Parliament

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[11] *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

[12] At [18].

[13] *Janssen-Ortho Inc v Amgen Canada Inc* (2005) 256 DLR (4th) 407 (ONCA).

picking up on the radio broadcasts querying why the Minister would not join other countries in contraindicating the relevant drug, adding, "Or will it take another death before the Minister finally acts?" The Court in that case considered the attempt to rely on the comments in the House infringed parliamentary privilege because it entailed a consideration of what caused the member to make the statement and so questioned the member's motivation.

[56] Mr Miles relies on the views of the majority of the Queensland Court of Appeal in *Erglis v Buckley.*[14] In particular, he points to the acceptance in that case of the proposition that it is permissible to refer to publication in the House if the intention is the more limited one of increasing the amount of damages. The situation envisaged is one where it is alleged those damages followed as a result of the foreseeable subsequent publication of the alleged defamation in the media.[15]

[57] In *Erglis*, a Minister in the State Government met with a number of nurses who were upset by a statement made in Parliament by an opposition member about the management of a hospital ward. It was accepted that the source of the information published on that occasion was Ms Erglis, also a nurse. The Minister asked the other nurses what she could do to help. They asked if the Minister would read a statement in the House if they provided her with one. The Minister agreed. She duly read and tabled the letter provided to her by the nurses in Parliament. The letter set out the nurses' response to Ms Erglis' claims.

[58] The position in *Erglis* was different in that the letter had an independent existence before it was given to the Minister. In this case, the statements would not have been required at all but for the questions in the House. But, in any event, we prefer the dissenting reasoning of Jerrard JA:

> [31] When what is pleaded to prove a damaging publication is simply the fact of verbatim reproduction, with no other comment or statement in the Parliament being pleaded, that pleading disguises the fact that the court is nevertheless being asked to examine the proceedings in Parliament. That examination will show that there was merely a republication and in this case that the defendants, as the plaintiff pleaded, were the source of the statements repeated. Even where those conclusions are established by

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14 *Erglis v Buckley* [2004] QCA 223, [2004] 2 Qd R 599.

15 See McPherson JA at 604 – 605.

> admissions in the pleadings, there has been an examination in the court proceedings of what happened in the Parliament, and of necessity an examination of what was said, by whom, and why. The plaintiff here seeks to prove that the Minister said what she did in Parliament because that was what the defendants told the Minister, knowing that she would repeat it. Proving that the Minster was the medium for the defendants' message means that a sufficient reason for the Minister's making the statement to Parliament is established to the court's satisfaction. If the plaintiff failed to prove that reason – namely the intended but mere republication of information supplied by the defendants – the plaintiff would fail ...
>
> ...
>
> [34] One foreseeable consequence of holding to the contrary would be the potential detrimental effect on the willingness of citizens to provide possibly important and possibly defamatory information to members of Parliament. An equally important and likely consequence of so holding would be the effect on proceedings in the Parliament such as those involved in this matter. A Member of Parliament who is exposing a source of information to the risk of increased damages by merely publishing verbatim the information given, thus enabling civil proceedings to occur of the kind brought here in which it is pleaded that republication in Parliament was intended and happened, may be able to avoid that consequence to her or his informants by adding comment and observation from other asserted or actual sources and thus providing a bowdlerized or fragmented version of the information given. If the Member takes the latter steps it will be difficult for any person to tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication. Such an examination would be very open to the complaint that it was questioning the speeches in Parliament and proceedings to determine why various statements were made and upon what they were based.

[59] As Gareth Griffith notes, the views of Jerrard JA are more consistent with the "continued provision of information to members of Parliament" the flow of which is important to a robust parliamentary democracy.[16]

[60] Cases such as *McManus v Beckham,*[17] also relied on by Mr Miles, are authority for the proposition that a plaintiff can rely on subsequent media publications to show increased damage where those publications were foreseeable at the time of the alleged defamation. The allegation in *McManus* was that Victoria Beckham had spoken to several customers in the plaintiffs' shop advising them not to buy autographs from the shop as they were fakes. It was alleged that the resultant,

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16 Gareth Griffith "Parliamentary Privilege: first principles and recent applications: (Briefing Paper No 1/09 NSW Parliamentary Library Research Service) at 28. The author refers to a comment to similar effect by E Campbell and M Groves "Correspondence with Members of Parliament" (2006) 11 MALR 227 at 235.

17 *McManus v Beckham* [2002] EWCA Civ 939, [2002] 1 WLR 2982.

extensive, media coverage was foreseeable thereby causing substantial loss to the business for which the defendant was liable. The Court of Appeal allowed an appeal from a decision to strike out the particulars relating to the media publication. But here, where the publication in the House is relied on to make the respondents liable or expose them to greater liability, Article 9 is a bar to the pleaded republication.[18]

[61] We note that Dobson J took the view that if the Minister used the public servant's words or a "close approximation" then liability may well arise for republication in the House, unless qualified privilege can be made out.[19] However, we do not see differences between the statements as critical because of the way the case is pleaded.

[62] Cases such as the present involve a tension between the competing values of protecting robust democracy and protecting the reputation of individuals. In terms of where the balance is struck between the competing values, it is relevant that the Standing Orders provide for those persons who consider their reputation has been damaged by a reference in the House to seek a response which can be incorporated into the Parliamentary record.[20] It is not the case that persons in Ms Leigh's position need be left without any remedy at all.

[63] Finally, we need to deal with Mr Tizard's submission that Article 9 also prevents reliance on the subsequent publications in the media.

[64] Mr Miles says that, taken to its logical conclusion, on the respondents' analysis, a plaintiff could not sue on media reports of parliamentary proceedings as such reports only occur as a result of publication in Parliament. Mr Miles notes that media reports of parliamentary proceedings are now afforded qualified privilege in terms of s 16 and sch 1 of the Defamation Act. The respondents' approach, he says, would denude that section of any application.

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[18] Professor Philip Joseph suggests that while the "effective repetition doctrine" has general application under the law of defamation, it has been misapplied in the Parliamentary context: "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 LQR 568 at 580ff.

[19] At [62].

[20] Standing Orders of the House of Representatives 2008, SO 155 – SO 158.

[65] The logic of our approach to the Minister's comments applies equally to the subsequent publications. That is not some general prohibition on media reportage of parliamentary debates, it could not be. But, given the way in which this case is run, as we have said, the real challenge is to what the Minister said in the House. It follows that reference to the media statements as republications involves a challenge to what the Minister said.

### The scope of proceedings in the House

[66] In the cross appeal, the respondents challenge the Judge's conclusion that absolute privilege cannot be claimed for the Briefing Paper or for the Oral Statements by virtue of their proximity to "proceedings in the House of Representatives". This raises a question about the scope of s 13 of the Defamation Act.

[67] Section 13 is in the following terms:

> **13. Absolute privilege in relation to Parliamentary proceedings**
>
> (1) Proceedings in the House of Representatives are protected by absolute privilege.
>
> (2) Any live broadcast, by any broadcaster, of proceedings in the House of Representatives is protected by absolute privilege.
>
> (3) The following publications are protected by absolute privilege:
>
> (a) The publication, by or under the authority of the House of Representatives, of any document:
>
> (b) The publication, to the House of Representatives, of any document, either by presenting the document to, or laying the document before, the House of Representatives:
>
> (c) The publication, by or under the authority of the House of Representatives, or under the authority of any enactment, of an official or authorised record of the proceedings of the House of Representatives:
>
> (d) The publication of a correct copy of any document or record to which paragraph (a) or paragraph (c) of this subsection applies.

[68] The respondents' case is that because the Briefing Paper and Oral Statements were necessary to enable the Minister to discharge his obligations to the House, they form part of the proceedings in the House. Mr Tizard refers to the requirements in the Standing Orders of the House relating to Parliamentary Questions.[21] In the respondents' submission, Mr Gow is the Minister's alter ego. Any other result would, it is submitted, inhibit debate in the House.

[69] Mr Miles submits that s 13 does not extend to the preparation of materials for the purpose of answering a Parliamentary Question. Mr Miles relies on the legislative history of s 13 which, he says, indicates Parliament ducked away from expanding the "proceedings of the House" to matters incidental to the business of the House.

[70] An example of such an expanded definition is that found in s 16 of the Parliamentary Privileges Act 1987 (Cth). In particular, s 16(2)(b) states that for the purposes of Article 9, proceedings in Parliament include the preparation of a document "for purposes of or incidental to the transacting of any such business". We do not see the absence of this wording in s 13 as determinative. Section 13(1) retains the Article 9 protection for "proceedings in the House". The jurisprudence on Article 9 is of course developing and the legislation allows for that. The Privy Council in *Prebble* considered that the principles in s 16(3) of the Parliamentary Privileges Act concerning the admissibility of evidence about proceedings in Parliament were declaratory of the effect of Article 9.[22]

[71] There is guidance on the approach to be taken to the issue before us in the recent decision of the United Kingdom Supreme Court in *R v Chaytor*.[23] That case required consideration of whether parliamentary privilege precluded criminal proceedings against Members of Parliament in relation to false expenses claims. The Supreme Court upheld the decision of the Court of Appeal allowing the criminal proceedings to go ahead.

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21 Standing Orders of the House of Representatives 2008, SO 63, SO 372, SO 374 – SO 376 provide for, amongst other matters, the timeframes within which questions for oral answer are to be lodged and answered.

22 At 7–8.

23 *R v Chaytor* [2010] UKSC 52.

[72] Lord Phillips began his discussion of the jurisprudence on Article 9 by citing a passage from *Erskine May*, which included the following:[24]

> The primary meaning of proceedings, as a technical parliamentary term, ... is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.

[73] After discussing the earlier authorities including *Prebble* and *Buchanan v Jennings*, Lord Phillips said the jurisprudence supported the view that:[25]

> ... the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

[74] Adopting that approach, Lord Phillips said the submission of claim forms for expenses did not qualify for the protection of privilege. The examination of claims by the courts would have no adverse impact on the core or essential business of Parliament and would not inhibit debate or freedom of speech.

[75] The issue in our case is more finely balanced than that in *Chaytor*. There is a link to the conduct of parliamentary business via Parliamentary Questions and a potential constraint on the Minister's response to Parliamentary Questions. There are examples of the courts seeing a need to protect activities performed at the direction of Parliament, for parliamentary purposes, even if performed by persons who are not members of Parliament.[26]

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[24] Sir William McKay (ed) *Erskine May Parliamentary Practice* (23rd ed, LexisNexis, London 2004), cited at [28] of *Chaytor.*

[25] At [47].

[26] See the discussion in *R v Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 WLR 669 (CA) and *Stewart v Ronalds* [2009] NSWCA 277, (2009) 232 FLR 331.

[76] On the other hand, as Lord Phillips observes:[27]

> There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted – freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of Members for conduct which is criminal.

[77] In the end, we consider the balance is best struck by not extending the absolute privilege. It is not as though there is no protection for those in the position of Mr Gow as the defence of qualified privilege is available to them.

## The pleadings issues

[78] Before leaving the issues relating to the first two causes of action, we will deal with two pleading points concerning the defamation claim that arise on the respondents' cross appeal. First, the respondents say that the Judge erred in finding that the publications of the Briefing Paper and the Oral Statements were not a single cause of action but were two separate causes of action. Second, the respondents say that Dobson J was wrong in declining to strike out the second cause of action given the insufficiency of the pleading of the words used in the second cause of action. We address each of these points in turn.

*One or two causes of action?*

[79] The respondents submit that the Briefing Paper and the Oral Statements should be regarded as a single publication, partly written and partly oral, because the two are so clearly connected that it is wrong in principle to say there are two publications. In developing this submission, Mr Tizard maintains there is a continuum of publication because the meaning of the words which are alleged to be defamatory is dependent upon the whole of the communications.

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27 At [61].

[80] Mr Miles says that, while it may be a little technical, the general principle as set out in *Gatley* is that "[e]ach communication of the material is a separate publication and gives rise to a separate cause of action".[28] He points out that while a "single publication" rule has developed in the United States under which multiple publications of material are aggregated into a single cause of action, that approach has not been followed in the United Kingdom, Australia or Canada.[29]

[81] In terms of the approach to be taken in determining whether a particular pleading would be permitted to remain, counsel referred to *Phelps v Nationwide News Pty Ltd* in which the New South Wales Supreme Court considered that individual circumstances would dictate whether a particular pleading will be permitted to stand.[30] Simpson J in that case said: [31]

> ... it is to be borne in mind that, subject to unfairness amounting to abuse of process, or unreasonableness, or the inability of the publication to sustain the form of pleading chosen, it is generally for the plaintiff to select the manner in which he/she/it wishes to present a case. It is only if the plaintiff's selection of the mode of pleading is untenable for one of those reasons that it will be struck out.

[82] The claim in *Phelps* related to stories in the *Weekend Australian*. The front page of the newspaper featured a "pointer" or "teaser", a brief reference to the story about the plaintiff with a reference to the full report which appeared on another page. The claim was pleaded on two alternative bases, one of which treated the pointer and the fuller item as separate publications. The Judge declined to strike out any part of the statement of claim although observing that the pleadings were cumbersome and added unnecessary complexity.

[83] Turning then to the circumstances of this case, we see no reason for taking a different view from that of Dobson J on this aspect. Ms Leigh does plead separate publication to the Minister and to the media and that the Briefing Paper was published to a wider group than the Oral Statements. Mr Tizard notes that the

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28 Patrick Milmo and WVH Rogers *Gatley on Libel and Slander* (11th ed, Sweet and Maxwell, London, 2008) at [6.3].

29 *Gatley* at [6.3] fn 28 and see *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805, [2002] QB 783; *Dow Jones Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575; and *Carter v BC Federation of Foster Parents Assn* [2005] BCCA 398.

30 *Phelps v Nationwide News Pty Ltd* [2001] NSWSC 130 at [22].

31 Ibid.

respondents accept that there was a meeting and that there was some discussion of the Briefing Paper at the meetings. But, while admitting that the Briefing Paper was given to the Minister and two others of those attending the meeting, the claim that there was a publication to other individuals at the meeting is denied. There is therefore some force in Mr Miles' submission that it appears from the statement of defence that, while the Briefing Paper was published to three people, the Oral Statements were made to the meeting as a whole. The fact that there is a difference in the groups to whom each publication is published is of some significance.

[84] Accordingly, we consider it would be premature to strike out the claim or any part of it on that basis.

*The requirement to plead actual words*

[85] The respondents say it is long established that the plaintiff must plead actual words of slander not, as here, merely their substance. In allowing the claim in relation to the Oral Statements to proceed, the respondents submit the Court is allowing a fishing expedition. Mr Tizard says this outcome is inconsistent with the approach taken in *Kerr v Haydon* where Cooke J referred to the summary of principles in *Halsbury's Laws of England.*[32] The passage cited stated that the actual words complained of "and not merely their substance" must be pleaded.[33] Cooke J went on to observe:[34]

> ... sometimes a plaintiff ... may be allowed to administer interrogatories to the defendant as to the precise words used. He will be required to satisfy the Court that he is not merely fishing; but if it is abundantly clear that the defendant has uttered some words slanderous of the plaintiff "of a definite character", the jurisdiction may be exercised ... .

[86] Similarly in *Best v Charter Medical of England Ltd*, also relied on by Mr Tizard, Keane LJ in delivering the judgment of the Court of Appeal for England and Wales drew a distinction between a fishing expedition and those cases where there was evidence of a good cause of action in defamation. [35]

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32 *Kerr v Haydon* [1981] 1 NZLR 449 at 451 and see also 456.
33 Ibid.
34 At 453.
35 *Best v Charter Medical of England Ltd* [2001] EWCA CIV 1588, [2002] EMLR 18 at [13].

[87] Mr Miles' position is that the modern authorities do not apply this pleading rule in such a strict manner. He refers to the Privy Council's decision in *Jennings v Buchanan* where Lord Bingham of Cornhill said:[36]

> ... the law does not demand a level of precision which is unattainable in practice. The plaintiff must plead the words complained of, but it is enough if the tribunal of fact is satisfied that those words accurately express the substance of what was said.

[88] In any event, Mr Miles argues, there is credible evidence of a defamatory statement and the issue of interrogatories is appropriate.

[89] The authorities, as Dobson J observed, do allow of some scope for exceptions from the general requirement to plead actual words. Mr Miles was able to point to some evidence which supports the submission that this is not simply a "fishing" expedition. Two of the examples given by Mr Miles suffice. First, the respondents admit the Briefing Paper was prepared as an "aide memoire", suggesting that the subsequent Oral Statements developed material in the Briefing Paper. Second, a high level source is recorded as saying the Minister had briefings with officials who "dumped all over Erin Leigh". Accordingly, we agree with Dobson J that strike out on the basis of lack of particularity is premature.

[90] We understand Ms Leigh has applied to administer interrogatories to Mr Gow with a view to eliciting specific answers as to his contribution to the 22 November 2007 meeting. The respondents say it would be objectionable to allow interrogatories as they have denied the allegation that they made or were responsible for the Oral Statements. Mr Miles responds that the Oral Statements are listed in a paragraph in the amended statement of claim and the fact the respondents make a bare denial means they may only be denying the paragraph because one of the listed statements did not occur. This is a matter that can be addressed in the context of the application to administer interrogatories. The question of particularity can be addressed again subsequently if that is necessary.

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[36] At [5].

## Negligence

[91] The third cause of action is for negligent mis-statement. Ms Leigh alleges the Ministry breached its duty of care towards her by failing to exercise reasonable care and skill in preparing the information in the Briefing Paper and in the Oral Statements. The claim is that the Ministry failed to adequately enquire about or have regard to positive matters that should have been reflected in the comments made about her.

[92] In challenging the strike out of this cause of action, Mr Miles relies on the decision of the House of Lords in *Spring v Guardian Assurance Plc*.[37] In that case, the House of Lords by a majority found that an employer who gave a reference in relation to a former employee owed the employee a duty to take reasonable care in the preparation of the reference and would be liable in negligence if failing to do so and the employee suffered economic loss as a result.

[93] Mr Miles submits that the circumstances of the present case are very similar to those in issue in *Spring* and, as there is sufficient proximity between the Minister and Ms Leigh, it is premature to strike out this part of the claim. Mr Miles emphasised the novelty of the claim and the commensurate need to be cautious in striking out such a claim. Mr Miles also argues that policy concerns do not negate the claim a duty was owed.

[94] For the reasons given by Dobson J we consider *Spring* is distinguishable. The briefing paper was not prepared as a reference or to address Ms Leigh's competence for the sake of prospective employers. Rather, material had to be prepared in what appeared to be a short timeframe to explain the circumstances of Ms Leigh's departure in the context of criticism about how it was Ms Curran was retained. As Dobson J said:

> [89] ... The opportunity to consider the impact on her future employment prospects, which would be to the fore in preparing a reference, could not reasonably come within the immediate scope of concerns for the officials in the Ministry when preparing a prompt response to the Minister's request.

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37 *Spring v Guardian Assurance Plc* [1995] 2 AC 296 (HL).

[95] We agree this case falls outside the requisite proximity.

[96] Further, as Mr Miles accepted, it is fair to say that *Spring* was not enthusiastically grasped by this Court in *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd.*[38] Rather, as Dobson J said in the present case, the Court showed a preference for confining the impact of *Spring* to its circumstances, ie, where there is a special relationship between the maker of the statement and the person about whom the statement was made, or where there has been a relevant assumption of responsibility.[39]

[97] Gault J in *Midland Metals* said that:

> [34] While we can readily accept the desirability of providing a remedy in Mr Spring's case and accept that such cases might justify imposing a duty of care in negligence, we do not see that referring to the harm in that case as economic loss distinguishes it from defamation cases. Nor do we find in the speeches of Their Lordships guidance on when it might be appropriate to draw a new balance with the right of freedom of expression and circumvent the requirement to prove malice in order to secure a remedy for the publication of false statements injuring reputation.

[98] Blanchard J accepted[40] that the law of qualified privilege had "proved problematical" in some respects such that some change in the law had occurred, citing *Spring* and *Lange v Atkinson*.[41] Blanchard J continued:

> [50] ... In the first instance a negligence action was permitted for damage done by an incorrect reference; in the second the approach of the Court to the question of whether an occasion of privilege is exceeded has some resemblance to an assessment of whether there has been negligence, although couched in terms of irresponsibility or recklessness.
>
> [51] But changes of this kind do not have the significant impact on the general balance of the law as would occur if, in response to the plaintiff's perception of a particular problem, the Court were to allow its case to go to trial on the present pleading of negligence. The law of defamation would be in danger of being subsumed within the law of negligence. The defences

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38 *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA).

39 See Gault J (delivering judgment for himself, Keith and McGrath JJ) at [19], [24]–[25], [33], [34] and [42]; Blanchard J at [53] and [55]–[56]; and Tipping J at [64]. This Court in *King v TV3 Network Services* (2003) 16 PRNZ 985 (CA) at [11], similarly treated *Spring* as a "one-off encroachment" on the availability of negligence as a cause of action when defamation can be alleged. Lord Brown of Eaton-under-Heywood in *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 at [135] similarly noted the emphasis in the speeches of the majority on the importance to *Spring* of the employer-employee relationship.

40 At [50].

41 *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

> normally available to a defamation defendant, as delineated in the Defamation Act, would be able to be circumvented.

[99] Finally, Tipping J said that the essence of the appellant's argument was to establish the tort of slander of goods or malicious falsehood by proof of negligence.[42] Tipping J considered that approach would have the consequence of altering the "careful balance" struck between the parties in the development of the two torts in favour of plaintiffs. Similarly, the balance between plaintiff and defendant under negligence law relating to careless statements would also be "materially altered" in favour of plaintiffs.[43]

[100] The policy factors relied on by Dobson J reflect the sorts of considerations which influenced the approach of this Court in *Midland Metals.* Dobson J said this of the alleged duty of care:

> [93] First, it does cut across the recognised boundary regulating the scope of tortious liability. The Courts have been wary of imposing a duty for negligent misstatement causing damage to reputation because the law addresses that harm within the law of defamation, where specialised defences, including – relevantly – qualified privilege, are well established to regulate the scope of potential liability. Another policy consideration is not to upset the balance between freedom of expression and a recognition of rights to protection of reputation. That takes on some real significance where the context of the communication is the Ministry's requirement to respond to a request for information from a Minister of the Crown. There should be no chilling influence, as would arise from the prospect of tortious liability for negligent misstatement exerted on those responding to such a requirement, given the level of importance attaching to full, frank and prompt responses in such situations.

[101] We agree with Dobson J that the policy considerations tell against the imposition of a duty of care.

**Disposition**

[102] For these reasons, we allow the appeal, to the extent that:

(a) the statements made in the Briefing Paper are capable of bearing the defamatory meanings pleaded; and

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[42] At [63].
[43] At [63].

(b) the Oral Statements are capable of bearing the pleaded meaning that the appellant was overly emotional.

[103] The Judge's finding that Article 9 of the Bill of Rights Act 1688 precludes the pleading that the Minister's statements in the House were a republication is upheld as is the strikeout of the cause of action for negligent misstatement.

[104] The parties agree that it was a mistake to strike out [48] of the amended statement of claim. That paragraph is reinstated.

[105] The cross appeal is dismissed.

**Costs**

[106] As each party has had a measure of success, we consider costs should lie where they fall. Accordingly, we make no order as to costs.

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