IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-495
[2016] NZHC 1801

UNDER	the Defamation Act 1992
BETWEEN	NINA LUPTON Plaintiff
AND	FAIRFAX NEW ZEALAND LIMITED Defendant

Hearing: 20 April 2016

Counsel: M F McClelland QC and C F Rieger for the Plaintiff
R K P Stewart and R G Cahn for the Defendant

Judgment: 5 August 2016

JUDGMENT OF ASSOCIATE JUDGE SMITH

Contents

[1] The plaintiff is a registered medical practitioner. At material times, she was practising as a general practitioner in New Plymouth.

[2] The defendant (Fairfax) is the publisher of the *Taranaki Daily News* newspaper, and the New Zealand news website at www.stuff.co.nz (the Stuff website).

[3] In this proceeding, Dr Lupton sues Fairfax for defamation, arising from articles published by Fairfax on 22 July 2013 in the *Taranaki Daily News* (under the headline "Family angry at lack of action on missed pregnancy") and on the Stuff website (under the heading "Family devastated by doctor's inaction – missed pregnancy was followed by miscarriage"). I will refer to the two articles together as "the Articles".

[4] Fairfax has filed a statement of defence in which it pleads, among other defences, the statutory defence of qualified privilege under the Defamation Act 1992 (the Act), on the basis that the words published in the Articles were fair and accurate reports of an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.[1] Fairfax also pleads qualified privilege at common law, on the basis that it had a duty to publish the information contained in the Articles, and the readers of the Articles had a corresponding interest in receiving that information. Fairfax further contends that the Articles concerned matters of legitimate public interest to the public of New Plymouth.

[5] Dr Lupton now applies to strike out Fairfax's defences of statutory and common law qualified privilege. She has also filed an application for leave to file, out of time, a notice under s 41 of the Act rebutting the qualified privilege defences, but no order will be required on that application if she succeeds with her first application and the qualified privilege defences are struck out.

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1 Defamation Act 1992, s 16(2) and sch 1, pt 2, cl 3(a).

Background

[6] Dr Lupton qualified as a general practitioner in the United Kingdom. She worked independently in that jurisdiction, before moving to New Zealand and commencing practice as a general practitioner in this country. Among other qualifications, she holds specialist diplomas in obstetrics and gynaecology.

[7] In early January 2013, Dr Lupton was working as a general practitioner at the Carefirst Medical Centre in New Plymouth. Although she was an experienced general medical practitioner, as an overseas-qualified doctor she was required to work under supervision during her first 12 months working in New Zealand. In early January 2013 Dr Lupton's supervisor was the medical director of the Carefirst Medical Centre, Dr. Kelly.

[8] On 4 January 2013 Dr Lupton was consulted by Mrs Groombridge. The reason for the consultation was a mole on Mrs Groombridge's back, but Dr Lupton noted some abdominal distension. Dr Lupton identified a palpable pelvic mass, and arranged for blood tests (which included a pregnancy test) and an ultrasound scan.

[9] Dr Lupton says that she advised Mrs Groombridge that the pregnancy test should be carried out straight after the consultation, and that she would discuss with a radiologist arrangements for an urgent ultrasound scan. The scan would likely be performed early the following week. However Mrs Groombridge advised Dr Lupton that she was going on a family holiday, and was not due to return until the following Wednesday. Mrs Groomsbridge elected not to change her holiday plans, and Dr Lupton requested an ultrasound scan which would fit in with those plans.

[10] On 6 January 2013 Mrs Groombridge suffered a miscarriage at an Auckland hospital. Shortly afterwards, she made a complaint to the Health and Disability Commissioner (the Commissioner).

[11] On 8 July 2013 a Deputy Health and Disability Commissioner, Ms Theo Baker, sent a letter (the Letter) advising that she had resolved pursuant to s 38(1) of the Health and Disability Commission Act 1994 (the HDC Act) to take no further action on Mrs Groomsbridge's complaint. In the Letter, the Deputy

Commissioner advised that the Commissioner's in-house clinical advisor had determined that Dr Lupton had departed from expected standards to a moderate degree in failing to exclude possible pregnancy in a timely manner, but otherwise Dr Lupton's management of the case "was conscientious and appropriate". The in-house clinical advisor had also advised that there were significant difficulties in making the diagnosis. The Deputy Commissioner expressed the belief that it would be appropriate for Dr Lupton to provide a written apology to Mrs Groombridge. She asked Dr Lupton to provide a copy of the apology, which she would forward to Mrs Groombridge.

[12] Fairfax published the Articles on 22 July 2013. The article published in the *Taranaki Daily News* included the following:

> **Family angry at lack of action on missed pregnancy**
>
> A New Plymouth family has been left traumatised after the miscarriage of a baby girl they did not realise existed.
>
> Samantha Groombridge is also angry the GP who failed to detect she was pregnant has avoided any serious punishment.
>
> Mrs Groombridge, 34, miscarried at 18 weeks, in January, but she did not realise she was pregnant.
>
> It was just days after she saw Dr Nina Lupton at New Plymouth's Carefirst Medical Centre complaining of vaginal bleeding and abdominal pain.
>
> The British GP was under a 12-month period of peer supervision required for overseas doctors new to New Zealand.
>
> Mrs Groombridge complained to the Health and Disability Commissioner about her treatment.
>
> Recently deputy Commissioner Theo Baker ruled that the failure to exclude the possibility of pregnancy was "a departure from expected standards".
>
> Ms Baker has asked that Dr Lupton provide a written apology but decided that no further disciplinary action was necessary.
>
> Dr Lupton examined Mrs Groombridge and discovered a lump "the size of an apple" in her womb but reassured her she was not pregnant despite not doing a urine test to confirm her diagnosis.
>
> Mrs Groombridge had taken two home pregnancy tests in December and both returned negative.
>
> Dr Lupton arranged for blood tests and an ultrasound to be done the following week.

> Mrs Groombridge, the mother of three boys, was given the all-clear to go away on a family holiday but two days later she miscarried at an Auckland hospital.
>
> "I was crying in the van from my stomach pains, it was like I was in labour".
>
> Initially the family left their little girl at the hospital but quickly changed their minds.
>
> "We were like, what have we done, we can't leave her there, she is part of us", Mrs Groombridge said.
>
> They arranged for a family member to pick up their baby's body and meet them in Hamilton.
>
> Mrs Groombridge's husband, Garry, was shocked by what happened.
>
> "The anger that was going through me, I didn't want to feel like that – one minute we didn't have a baby and now we are driving to pick up a dead baby girl" he said.
>
> The couple named the little girl Kaysea. She was cremated a couple of days later, which was traumatic for the family, and her ashes now sit beside the family tree.
>
> Mrs Groombridge has been left wondering what would have happened if the doctor had carried out the urine test.
>
> "Things might have been different if I was told to come home and rest, but we never got that chance".
>
> She said it was offensive that all she was being offered was an apology and she would be writing to the commissioner again to express her disgust.
>
> Dr Lupton is permitted to practise medicine in New Zealand under the supervision of Dr Lester Kelly, who is the medical director of the Carefirst clinic, which has 13 doctors.
>
> Dr Kelly could not be contacted by the *Taranaki Daily News* yesterday.

[13] A photograph of Mrs Groombridge and her family appeared with the article. The text beneath the photograph read:

> **A family's pain:** Samantha and Garry Groombridge, with their boys…The couple were devastated after a doctor she visited when suffering vaginal bleeding and abdominal pain failed to realise she was pregnant before she had a miscarriage.

[14] The article on the Stuff website had the same content, but was entitled "Family devastated by doctor's inaction – Missed pregnancy was followed by miscarriage".

[15] The Fairfax journalist responsible for the Articles did not approach Dr Lupton herself for comment before the articles were published. Fairfax says that the journalist did endeavour to approach Dr Kelly, but Dr Kelly's telephone number was not listed and the medical practice was not open that Sunday (the day the journalist prepared the story). Fairfax says that the journalist found an email address for Dr Kelly and tried to contact him by email, but did not receive a response. The journalist succeeded in contacting Dr Kelly on the Monday, and Fairfax published an article reporting on his reaction in the *Taranaki Daily News* and on the Stuff website, the day following the publication of the Articles. The follow-up article published by Fairfax on 23 July 2013 read:

> **Clinic medical director supports GP over pregnancy**
>
> A New Plymouth medical clinic is standing by a GP who failed to detect a woman was pregnant just two days before she miscarried.
>
> In January Samantha Groomsbridge saw Dr Nina Lupton at New Plymouth's Carefirst Medical Centre, complaining of vaginal bleeding and abdominal pain.
>
> Dr Lupton did not detect Mrs Groomsbridge was pregnant and she miscarried two days later, which eventually resulted in her making a complaint to the Health and Disability Commissioner.
>
> The commissioner ruled the failure to exclude the possibility of pregnancy was "a departure from expected standards", but decided no further disciplinary action was necessary.
>
> Mrs Groomsbridge said she would be writing to the commissioner again to express her disgust at only being offered an apology.
>
> Dr Lupton is permitted to practise medicine in New Zealand under the supervision of Dr Lester Kelly, who is the medical director of the Carefirst clinic, which has 13 doctors.
>
> Dr Kelly yesterday told the *Taranaki Daily News* there was no reason to take any further action against Dr Lupton.
>
> "The Health and Disability Commission has noted that overall the management plan was appropriate given the presentation", Dr Kelly said.
>
> "We have peer reviewed the case and believe that Dr Lupton did a thorough and conscientious job".
>
> David Maplesden, an in-house clinical advisor for the Health and Disability Commissioner, considered Dr Lupton's consultation with Mrs Groomsbridge at the clinic was well documented overall and the management plan was appropriate.

> Dr Kelly said Dr Lupton was a fully qualified and widely experienced GP, specifically recruited on the basis of her impeccable training, experience and references.
>
> "She is a member of the Royal College of GPs in the UK and is also a fellow of the New Zealand College of GPs, making her a general practice specialist in two countries", he said.
>
> "She has additional post-graduate qualifications in obstetrics and gynaecology. She is more qualified than the majority of GPs in New Zealand".
>
> Dr Kelly said Dr Lupton did not require "supervision" in the traditional sense.
>
> "The supervision that is being talked about is a standard period of observation that all foreign doctors undergo when they move to New Zealand, no matter what their qualifications are. It is aimed at ensuring their easy integration into the New Zealand health system and as a double safety check that they conform to New Zealand Standards".
>
> He said there had never been any concerns that Dr Lupton's clinical practice had been anything except at the highest level.
>
> "The supervision does not require actual oversight of each individual consultation. This supervision should not be confused with supervision that may be required by a newly qualified doctor as Dr Lupton is a fully qualified and experienced GP".
>
> Dr Kelly said Dr Lupton was not required to seek a second opinion as she was a fully qualified GP.

[16] Dr Lupton's solicitors wrote to the editors of the *Taranaki Daily News* and the Stuff website, putting them on notice of her concerns over the Articles, on 26 July 2013. On the same day Dr Lupton's counsel wrote to the Commissioner expressing concern over the decision notified by the Deputy Commissioner on 8 July 2013.

[17] On 31 July 2013, counsel for Fairfax advised Dr Lupton's solicitors of their view that the Articles were protected by statutory qualified privilege, and that while the article on the Stuff website had been taken down it was intended that it would be reinstated online. Fairfax offered to publish a statement in explanation or contradiction on behalf of Dr Lupton at the foot of each article.

[18] On 18 November 2013 Professor Dowell, an expert retained for Dr Lupton, provided a report on Dr Lupton's management of the case. Professor Dowell

rejected the clinical advisor's view that Dr Lupton's actions amounted to a moderate departure from accepted standards. He considered that Dr Lupton had shown a high level of clinical acumen.

[19] On 18 November 2013 Mrs Groombridge filed a complaint against Dr Lupton in the Human Rights Review Tribunal.

[20] By June 2014, the Commissioner had completed a reconsideration of the complaint against Dr Lupton, taking into account the views expressed by Professor Dowell. On 11 June 2014, the Commissioner advised that Dr Lupton was no longer required to provide a written apology, as there was no longer any finding that her treatment amounted to a departure from accepted standards. The Commissioner advised the Medical Council accordingly.

[21] Discussions followed between the parties' legal advisors. Dr Lupton's counsel requested that a retraction and apology be published online and on the front page of the *Taranaki Daily News*. Fairfax declined to publish the retraction and apology sought by Dr Lupton.

[22] Mrs Groomsbridge's complaint to the Human Rights Review Tribunal was withdrawn in September 2014.

[23] This proceeding was commenced on 19 June 2015, and Fairfax filed and served its statement of defence on 10 August 2015. Further discussions followed between the parties' legal advisers, and in a joint memorandum for the Court dated 17 September 2015 counsel advised that settlement discussions were "reasonably advanced". An adjournment was sought to allow the discussions to continue.

[24] A further joint memorandum of counsel dated 23 October 2015 referred to "ongoing settlement discussions", but it also advised that Dr Lupton intended to file a s 41 notice/leave application by 11 November 2015.

[25] Dr Lupton filed her application to strike out the qualified privilege defences on 28 January 2016. On the same day she filed her application for leave to file, out

of time, a notice under s 41 of the Act, setting out her rebuttal of the qualified privilege defences.

The statement of claim

[26] Dr Lupton says that the Articles would have been understood by ordinary, reasonable readers as conveying a number of meanings which she says are untrue and defamatory. The pleaded meanings include the following:

(1) that due to her lack of experience, Dr Lupton was only permitted to practise in New Zealand under supervision of another doctor;

(2) that Dr Lupton failed to consider or appreciate the possibility that Mrs Groombridge was pregnant;

(3) that Dr Lupton failed to advise Mrs Groombridge at the consultation that she was possibly pregnant;

(4) that Dr Lupton failed to explain to Mrs Groombridge the urgency of the situation, and despite the urgency, advised Mrs Groombridge that she could go away on a family holiday;

(5) that Dr Lupton was responsible for Mrs Groombridge's miscarriage;

(6) that Dr Lupton was incompetent or negligent in her care and management of Mrs Groombridge;

(7) that Dr Lupton's conduct was such that disciplinary action was necessary;

(8) that the shortcomings in Dr Lupton's care for and management of Mrs Groombridge were such that an apology was not a sufficient disciplinary outcome.

The statement of defence

[27] In its statement of defence, Fairfax denies the defamatory meanings pleaded by Dr Lupton. It then pleads statutory qualified privilege, in the following terms:

> 33. If any of the words complained of conveyed any of the meanings pleaded by the plaintiff (which is denied) then those words consisted of a fair and accurate report of an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand and, accordingly, were published on an occasion of qualified privilege.
>
> *Particulars*
>
> …
>
> 33.5 On 8 July 2013 Ms Baker released her report in relation to the Complaint ("the Decision").
>
> 33.6 To the extent the words complained of referred to the Decision they constituted a fair and accurate report of the said Decision, which was a report made under [the HDC Act] by the Commissioner.
>
> 33.7 Section 65(5) of [the HDC Act] provides that any report made under that Act by the Commissioner shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.
>
> 33.8 Accordingly, the said words are protected by qualified privilege by virtue of section 16(2) of [the Act] and paragraph 3(a) of Part II of the Schedule 1 thereto.
>
> 34. At the time of their publication [the Articles] were each a matter of public interest in any place in which those publications occurred.
>
> *Particulars*
>
> 34.1 At the time of the publication of the Articles the plaintiff continued to practise at the Carefirst Medical Centre in New Plymouth.
>
> 34.2 Carefirst was, at that time, the largest Medical Centre in New Plymouth with 13 General Practitioners caring for over 13,000 patients.

[28] As a further or alternative defence, Fairfax pleads the defence of common law privilege, in the following terms:

> 35. If any of the words complained of conveyed any of the meanings pleaded by the plaintiff (which is denied) the defendant had a duty to publish the information contained in the Articles and the readers of

the *Taranaki Daily News* had a corresponding interest in receiving that information.

36. The Articles concerned matters of legitimate public interest to the public of New Plymouth and readers of the *Taranaki Daily News* and each was published on an occasion of qualified privilege.

Particulars

36.1 The quality of medical care provided to the public by registered medical practitioners is a matter of public interest.

36.2 At the time of the publication of the Articles the plaintiff continued to (sic) practice at the Carefirst Medical Centre in New Plymouth.

36.3 Carefirst was, at that time, the largest Medical Centre in New Plymouth with 13 General Practitioners caring for over 13,000 patients.

The relevant statutory framework

(a) Sections of the Defamation Act 1992 relevant to the statutory qualified privilege defences

[29] The following provisions of the Act are relevant:

16 Qualified privilege

…

(2) Subject to sections 17 to 19, the publication of a report or other matter specified in Part 2 of Schedule 1 is protected by qualified privilege.

(3) Nothing in this section limits any other rule of law relating to qualified privilege.

18 Restrictions on qualified privilege in relation to Part 2 of Schedule 1

(1) Nothing in section 16(2) protects the publication of a report or other matter specified in Part 2 of Schedule 1 unless, at the time of that publication, the report or matter is a matter of public interest in any place in which that publication occurs.

(2) In any proceedings for defamation in respect of the publication in any newspaper … of a report or other matter specified in Part 2 of Schedule 1, a defence of qualified privilege under section 16(2) shall fail if the plaintiff alleges and proves—

(a) that the plaintiff requested the defendant to publish, in the manner in which the original publication was made, a

reasonable letter or statement by way of explanation or contradiction; and

(b) that the defendant has refused or failed to comply with that request, or has complied with that request in a manner that, having regard to all the circumstances, is not adequate or not reasonable.

19 Rebuttal of qualified privilege

(1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

(2) Subject to subsection (1), a defence of qualified privilege shall not fail because the defendant was motivated by malice.

41 Particulars of ill will

(1) Where, in any proceedings for defamation,—

(a) the defendant relies on a defence of qualified privilege; and

(b) the plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication,—

the plaintiff shall serve on the defendant a notice to that effect.

(2) If the plaintiff intends to rely on any particular facts or circumstances in support of that allegation, the notice required by subsection (1) shall include particulars specifying those facts and circumstances.

(3) The notice required by subsection (1) shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.

Schedule 1, Part 2 Publications subject to restrictions in section 18

…

3 A fair and accurate report of the proceedings in an inquiry held under the authority of—

(a) the Government or Parliament of New Zealand; or

(b) the Government or legislature of a territory outside New Zealand,—

> or a true copy of, or a fair and accurate extract from or summary of, any official report made by the person by whom the inquiry was held.
>
> …

(b) Sections of the Defamation Act 1992 relevant to the common law privilege defence

[30] Section 16(3), quoted above, preserves a defendant's right to invoke the common law defence of qualified privilege. Sections 19 and 41 above also apply to common law qualified privilege.

(c) Relevant provisions of the Health and Disability Commissioner Act 1994

[31] Section 38 of the HDC Act materially provides:

> **38 Commissioner may decide to take no action or no further action on complaint**
>
> (1) At any time after completing a preliminary assessment of a complaint (whether or not the Commissioner is investigating, or continuing to investigate, the complaint himself or herself), the Commissioner may, at his or her discretion, decide to take no action or, as the case may require, no further action on the complaint if the Commissioner considers that, having regard to all the circumstances of the case, any action or further action is unnecessary or inappropriate.
>
> (2) The Commissioner's consideration under subsection (1) may, in particular, take into account any of the following matters:
>
> (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made:
>
> (b) whether the subject matter of the complaint is trivial:
>
> …
>
> (4) In any case where the Commissioner decides to take no action, or no further action, on a complaint, the Commissioner must inform the following persons and agencies of that decision and the reasons for it:
>
> (a) the complainant:
>
> (b) the health care provider or the disability services provider to whom the complaint relates:

(c) any agency or any person to whom the complaint has, in accordance with section 34 or section 36, been referred:

(d) any advocate to whom the complaint has been referred.

[32] Section 38 is situated within pt 4 of the HDC Act, which is concerned with complaints and investigations. Under s 31 a person may complain orally or in writing to the Commissioner alleging that any action of a healthcare provider is or appears to be in breach of the Code of Health and Disability Services Consumers' Rights (the Code). Once a complaint is made under s 31, the Commissioner is required by s 33 to make a preliminary assessment of the complaint to decide whether to take one or more of four stated courses of action. Those courses of action include referring the complaint to an agency or person in accordance with ss 34 or 36 of the HDC Act, and the Commissioner investigating the complaint himself or herself. A further option for the Commissioner under s 33 is to take no action on the complaint.

[33] Sections 40 to 49 of the HDC Act deal with investigations by the Commissioner. Under s 40(3), the Commissioner may investigate an action under the section either on receipt of a complaint or on the Commissioner's own initiative, if it appears to the Commissioner that any action of a healthcare provider (or disability services provider) is or appears to be in breach of the Code. The complainant and the provider are required to be notified of the investigation,[2] and there are provisions for the Commissioner to give notice of the investigation to the appropriate authority,[3] and for the Commissioner, on completion of the investigation, to advise certain parties of the results of the investigation and of any further action the Commissioner proposes to take (or if it is the case, that the Commissioner proposes to take no further action).[4]

[34] The persons to whom that advice must be given include the complainant and the healthcare provider.

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2 HDC Act, s 41.
3 HDC Act, s 42.
4 HDC Act, s 43.

[35] Section 45 sets out the procedure which is to be followed after the Commissioner has completed an investigation. If the Commissioner is of the opinion that any action that was the subject matter of the investigation constituted a breach of the Code, the Commissioner may take all or any of a number of steps. Those steps include the following:

> **45 Procedure after investigation**
>
> …
>
> (2) If this section applies, the Commissioner may do all or any of the following:
>
> (a) report the Commissioner's opinion, with reasons, to any health care provider or disability services provider whose action was the subject matter of the investigation, and may make any recommendations as the Commissioner thinks fit:
>
> (b) report the Commissioner's opinion, with reasons, together with any recommendations that the Commissioner thinks fit, to all or any of the following:
>
> (i) any authority or professional body:
>
> (ii) the Accident Compensation Corporation:
>
> (iii) any other person that the Commissioner considers appropriate:
>
> (c) make any report to the Minister that the Commissioner thinks fit:
>
> (d) make a complaint to any authority in respect of any person:
>
> (e) if any person wishes to make such a complaint, assist that person to do so:
>
> …

[36] Section 46 of the HDC Act provides that where the Commissioner has made any recommendation under s 45(2)(a) or (b) to any person, the Commissioner may request that person to notify the Commissioner, within a specified time, of the steps (if any) that the person proposes to take to give effect to the recommendation. Under s 46(2), the Commissioner is required to inform the complainant if the person to whom the recommendation is made appears to have taken no or inadequate or inappropriate action on the recommendation. The Commissioner may also, if he or

she considers it appropriate, "transmit to the Minister such report on the matter as the Commissioner sees fit".

[37] Section 65(5) of the HDC Act is contained in a part of the Act headed "Miscellaneous provisions". The subsection provides:

> **65 Proceedings privileged**
>
> …
>
> (5) For the purposes of clause 3 of Part 2 of Schedule 1 of the Defamation Act 1992, any report made under this Act by the Commissioner shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.

[38] Section 67 of the HDC Act deals with the situation where the Commissioner, in a report under any of ss 14, 45, 46(2)(b) of the HDC Act, or in his or her annual report published under pt 4 of the Crown Entities Act 2004, makes any comment that is adverse to any person. No such adverse comment is to be made unless that person has been given a reasonable opportunity to be heard and to make a written statement in answer to the adverse comment.

Principles applicable to strike-out applications

[39] The parties are agreed that the Court should apply the following principles in considering Dr Lupton's strike-out application:

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The cause of action or defence must be clearly untenable. As Elias CJ and Anderson J noted in *Couch v Attorney-General*, "it is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed".[5]

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5 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725, at [33].

(c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.[6]

[40] The Court should be slow to strike out a claim in any developing area of the law, particularly where a duty of care is alleged in a new situation. In *Couch*, Elias CJ and Anderson J said "particular care is required in areas where the law is confused or developing".[7]

[41] In this case, the application is to strike out an affirmative defence. It is to be considered on the basis that Dr Lupton will succeed in proving that the Articles had the defamatory meanings which she has pleaded, and that one or more of those meanings were defamatory of her.

The issues

[42] The following issues fall to be determined:

(1) Should the defence of statutory qualified privilege be struck out because:

(i) the Letter was not an "official report made by a person holding an inquiry under the authority of the Parliament of New Zealand" under s 65(5) of the HDC Act; or

(ii) (if the Letter *was* an "official report" covered by s 65(5) of the HDC Act) the Articles were not fair and accurate reports of that "official report", and thus do not fall within cl 3 of pt 2 of the Schedule to the Act; or

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6 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267, and *Couch v Attorney-General*, above n 5, at [33].

7 *Couch v Attorney-General*, above n 5, at [33].

(iii) (if the Articles *were* fair and accurate reports of an official report covered by s 65(5) of the HDC Act) the Articles were not, at the time they were published, a matter of public interest in any place in which the publications occurred (s 18(1) of the Act); or

(iv) Fairfax has refused or failed to comply with a request made under s 18(2) of the Act that it publish a reasonable letter or statement by way of explanation or contradiction?

(2) Should the defence of common law qualified privilege by struck out because:

(i) New Zealand law does not recognise common law qualified privilege in respect of a generic averment of "public interest"; or

(ii) as a matter of law, the Articles are incapable of attracting qualified privilege, as Fairfax did not have a duty to publish the information contained in the Articles and the readers of the Articles did not have any corresponding interest in receiving that information; or

(iii) the publications in the Articles were excessive?

(3) If one or both of the qualified privilege defences is *not* struck out, should Dr Lupton be granted an extension of time to file a notice under s 41 of the Act rebutting the qualified privilege defences?

Issue 1 – the statutory qualified privilege defence

Issue 1(i) – was the Letter an "official report made by a person holding an inquiry under the authority of the Parliament of New Zealand", under s 65(5) of the HDC Act?

The parties' submissions

[43] Dr Lupton contends that the Letter is not a report of "proceedings in an inquiry". She says that all that happened was that Mrs Groombridge made a complaint under s 31, the Deputy Commissioner sought advice from an in-house expert, and the Deputy Commissioner then wrote to Mrs Groombridge under s 38(4) informing her of her decision to take no further action.

[44] Mr McLelland submits that s 65(5) refers only to the reports which are provided for in s 45, namely reports completed by the Commissioner after he or she has decided to conduct an investigation of a complaint and has made a report following that investigation. He submits that a letter informing a complainant of a decision to take no further action is simply that – it is quite different from a full report from the Commissioner under s 45 where there has been a finding that there has been a breach of the Code.

[45] In the alternative, Mr McLelland submits that, to come within s 65(5), a report must be a report of a *concluded* inquiry under s 45. He submits that that is the only fair and reasonable construction of cl 3 of pt 2 of sch 1 to the Act.

[46] Mr McLelland notes the use of the present tense "holding an inquiry" in s 65(5), and contrasts it with the (apparently past tense) expression "an inquiry held" in cl 3 of pt 2 of sch 1 of the Act. He submits that the word *held* is used in the Act to limit protection to reports of official reports of concluded inquiries. He submits that there is no sound reason why Parliament would envisage protection being made available for "reports" of ongoing inquiries under the HDC Act, but limit the qualified privilege protection for inquiries which are not conducted under the Act, to concluded inquiries.

[47] For Fairfax, Mr Stewart submits that Mr McLelland is placing an unjustified gloss on the wording of s 65(5). In his submission, s 65(5) applies when the Commissioner makes *any* report under the HDC Act. He notes that the word "report" is not defined in the HDC Act, but the *Shorter Oxford Dictionary* definition is "an account given or opinion expressed on some particular matter, esp. after investigation or consideration".

[48] Mr Stewart draws attention to the fact that s 65(5) is within that part of the HDC Act which deals with miscellaneous matters. It is not within pt 4 of the Act, which contains the sections dealing with "Investigations by the Commissioner". The location in the "Miscellaneous provisions" part of the HDC Act shows that s 65(5) was intended to have more general application.

[49] Mr Stewart contrasts the reference to "any report" in s 65(5), with s 67, which deals with adverse comments made by the Commissioner in reports published under any of ss 14, 45 and 46(2)(b), or in the Commissioner's annual report. He submits that if the application of s 65(5) had been intended to be confined to reports following an investigation, the section would have been drafted in similar terms to s 67.

[50] More generally, Mr Stewart notes that the Commissioner's work does not necessarily involve investigative processes. The Commissioner has a wide range of options when receiving a complaint, and can deal with complaints in a variety of ways. The protection offered by s 65(5) would be severely limited if it only applied to a report of "proceedings in an inquiry", or a concluded inquiry or investigation.

[51] Although the Commissioner may decide to take no action on a complaint, Mr Stewart submits that the preliminary assessment procedure is still a robust process, and the notification of the result of that process is a "report", i.e. an account or opinion of a matter given after investigation or consideration. He refers to the thorough process the Commissioner undertakes gathering information, and notes that one of the Commissioner's functions (under s 14) is to "gather such information as in

the Commissioner's opinion will assist the Commissioner in carrying out the Commissioner's functions [under the HDC Act]".[8]

[52] Mr Stewart also notes that, in a letter to the Commissioner dated 15 November 2013, Dr Lupton herself disagreed with the Commissioner's "original report".

[53] Finally, Mr Stewart submits that to restrict the ambit of s 65(5) to reports of "proceedings of an inquiry", or "concluded inquiries", would severely limit the dissemination of the Commissioner's decisions to the public. He submits that that would be inconsistent with one of the functions of the Commissioner, which is to promote, by education and publicity, respect for and observance of the rights of health consumers and disability service consumers, and, in particular, to promote awareness, among health consumers, disability service consumers, healthcare providers, and disability service providers, of the rights of health consumers and disability service consumers and of the means by which those rights may be enforced.[9]

Conclusions on Issue 1(i)

[54] In my view the Letter was not an "official report" of the kind referred to in s 65(5).

[55] I note first that the HDC Act uses a variety of expressions to cover advice or information communicated by the Commissioner. For example, s 14, which sets out the functions of the Commissioner, states that one of the Commissioner's functions is to "advise" the Minister on certain matters (s 14(1)(j)), while another function is to "report" to the Minister from time to time on the need for, or desirability of, legislative, administrative or other action (s 14(1)(k)).

[56] Under s 33, the Commissioner is not initially required to make a "report" on a complaint – the Commissioner's task is to make a "preliminary assessment". Following that preliminary assessment, the Commissioner may decide to take no

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8 Section 14(1)(m).
9 Section 14(1)(c).

action on the complaint, investigate the complaint himself or herself, or take any of the other steps referred to in s 33(1)(a). The Commissioner is required to promptly "notify" the complainant and the healthcare provider of the Commissioner's preliminary assessment (s 33(2)).

[57] The Commissioner's discretion to take no action on a complaint is specifically addressed in s 38. Section 38(2) sets out a list of matters the Commissioner may take into account in deciding to take no action, and under s 38(4), the Commissioner must "inform" various parties of the decision and the reasons for it.

[58] So far, then, we see the following expressions used to described communications from the Commissioner: "advise", "report", "notify" and "inform".

[59] As soon as reasonably practicable after the Commissioner has completed an investigation of a complaint, the Commissioner is required to "advise" certain persons of the results of the investigation and of any further action that the Commissioner proposes to take (or that the Commissioner proposes to take no further action as the case may be).[10]

[60] The complainant, and the healthcare provider whose action was the subject of the investigation, are among those to whom the "advice" must be given under s 43(1).

[61] Section 45 sets out the procedures which apply if, after making an investigation, the Commissioner is of the opinion that any action that was the subject matter of the investigation was in breach of the Code. If the Commissioner has formed that opinion he or she may take all or any of the steps set out in s 45(2). Three of those steps include the making of a "report". Under s 45(2)(a), the Commissioner may "report" the Commissioner's opinion, with reasons, to any healthcare provider whose action was the subject matter of the investigation (with any recommendations the Commissioner may think fit to make), and under s 45(2)(b) the Commissioner may "report" the Commissioner's opinion, with reasons

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[10] Section 43(1).

and any recommendations, to any authority or professional body, the Accident Compensation Corporation, or any other person that the Commissioner considers appropriate. The Commissioner may also make any "report" to the Minister that the Commissioner thinks fit to make (s 45(2)(c)).

[62] Looking at ss 43 and 45 together, it appears that a two-stage procedure was contemplated. First, the Commissioner "advises" certain people (including the complainant and that healthcare provider) of the results of the investigation, and whether the Commissioner proposes to take any further action. A "report" will only be made if the Commissioner forms the opinion that there has been a breach of the Code (and the Commissioner then decides to provide a reasoned "report").[11]

[63] The expression "report" is used again in s 46(2)(b). Section 46 is concerned with the implementation of recommendations made by the Commissioner, and subs 2 is particularly concerned with the Commissioner's options if the person to whom a recommendation has been made takes no action on the recommendation, or the Commissioner considers that any action taken has not been adequate and appropriate. In that circumstance, the Commissioner must "inform" the complainant of the Commissioner's recommendations, and may make such comments on the matter as the Commissioner thinks fit. In addition, the Commissioner may, where the Commissioner considers it appropriate, transmit to the Minister such "report" on the matter as the Commissioner thinks fit.[12]

[64] In my view the decision of the legislature to use a variety of different expressions to described statutory communications by the Commissioner was deliberate, and the use of the expression "report" was intended to refer only to the more formal expressions of opinion made by the Commissioner after his or her consideration of a particular issue under the HDC Act. Mr Stewart cites the *Shorter Oxford Dictionary* definition of "report" as "an account given or opinion expressed on some particular matter esp. after investigation or consideration", and I accept that definition as far as it goes. But the ultimate question is what meaning is to be given to the expression where it appears in s 65(5). In my view "report", where

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11 Section 45(1)(a).
12 Section 46(2)(b).

the expression is used throughout the HDC Act, denotes the most formal of communications from the Commissioner after he or she conducts an investigation or consideration, and s 65(5) is only intended to cover communications from the Commissioner which are required to be made by way of "report" under other sections of the HDC Act.

[65] In this case, the communication was made following a preliminary assessment only, after which the Deputy Commissioner decided that it was appropriate to take no action on the complaint. The Commissioner was not required by s 38 to prepare a "report" recording that decision and the reasons for it, but merely to "inform" the affected persons and agencies.[13]

[66] Standing back from the text of the HDC Act, it seems to me that that view is consistent with the purpose of the statutory qualified privilege as set out (inter alia) in cl 3 of pt 2 of Sch 1 of the Act. The statutory qualified privilege reflects a legislative intention that the public's right to know the result of an official inquiry trumps the right of a person referred to in a report of the output of that inquiry not to be defamed, so long as the "report of the official report" is fair and accurate and meets the requirements of s 18 of the Act. I think it is understandable that mere advice from the Commissioner following a preliminary assessment that he or she proposes to take no further action, has not been regarded by Parliament as a sufficiently important communication from the Commissioner that the statutory qualified privilege should apply to it. The public interest in knowing the result of a complaint against a health care provider is of lesser importance where the Commissioner has made a preliminary assessment and decided that no further action is necessary.

[67] I think those views are also consistent with s 67 of the HDC Act, relating to comments made by the Commissioner in certain reports which are adverse to a person. In my view s 67 reinforces the elevated status of "reports" and "recommendations" made under the HDC Act, over communications from the Commissioner which are described using lesser expressions such as "advise", "inform" or "notify". Section 67 can therefore be seen as complementing an

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[13] Section 38(4).

interpretation of s 65(5) which excludes from the definition of "report" lesser forms of communication from the Commissioner, such as the "informing" which is required by s 38(4). Because reports or recommendations provided under the sections referred to in s 67 will attract statutory qualified privilege under s 65(5), it is important that anyone who might be defamed by a comment made in the report or recommendation should have the right to be heard, and to answer the adverse comment before the report or recommendation is published.

[68] For all of those reasons, I conclude that the Letter was not a "report" covered by s 65(5) of the HDC Act.

[69] The foregoing findings mean that the statutory qualified privilege defence must be struck out.

Issues 1(ii) – 1(iv)

[70] My findings on issue 1(i) mean that it is not necessary for me to address these issues.

Issue 2: Should the defence of common law qualified privilege be struck out?

The parties' submissions

[71] For Dr Lupton, Mr McLelland submits that a plea of qualified privilege will be struck out where the defendant plainly had no obligation to put the relevant defamatory allegations into the public domain, and a wide publication was clearly not warranted by the occasion.[14]

[72] He says that this is a case where the Court should strike out the defence: a trial is not likely to yield any factors supporting a claim of privilege. All there is to say is already before the Court.

[73] Mr McLelland acknowledges that New Zealand case-law has developed considerably in recent times in respect of common law qualified privilege. Political

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[14] Citing Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013), at [30.40].

discussion pertaining to former, current or aspiring parliamentarians has been afforded the status of a qualifying occasion,[15] and recent cases have also supported an extension to other forms of representative and responsible government.[16] But whatever steps the common law may have taken, Mr McLelland submits it would be a step too far to propose that defamatory statements made about a doctor (seeing a patient in a private consultation) or other professional person should also necessarily qualify for blanket protection. The Act simply does not recognise any generic "public-interest qualified privilege".

[74] In Mr McLelland's submission, the best Fairfax can argue is that there is a commonality of interest between Fairfax and readers of the Articles, because those readers might also be actual or potential patients of Dr Lupton. Any such argument would say that those readers would have an interest in knowing about Dr Lupton's alleged misdemeanours. Mr McLelland submits that that is a dangerous proposition, because it would encourage the dissemination of serious allegations without proper factual enquiries being made, and natural justice being adhered to.

[75] Further, Mr McLelland submits that there can be no justification for Fairfax publishing a "local" issue to a vast national and potentially international audience via the Stuff website.[17] Such a wide publication was not fairly warranted by the occasion. Mr McLelland further submits that, even if there is a prima facie common law qualified privilege available, the Articles contained excessive material, so as to preclude the privilege's application.[18] He submits that the Articles contained extraneous and excessive criticisms of Dr Lupton, which, bolstered by the fact that she was not afforded an opportunity to comment before the Articles were published, preclude the application of the common law privileged defence.

[76] For Fairfax, Mr Stewart asks the Court to develop the common law by permitting the defence of common law qualified privilege in New Zealand to apply

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15 *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA).

16 Citing *Dooley v Smith* [2012] NZHC 529 at [172]–[186] (although the Judge and later the Court of Appeal left that point undecided: *Smith* v *Dooley* [2013] NZCA 428 at [74]).

17 Although I note Fairfax pleaded common law qualified privilege only in respect of the article in the *Taranaki Daily News*.

18 Citing *Lange v Atkinson (No 2)*, above n 15, at [21], and John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, Lexis Nexis, Wellington 2010) at [3.2.4].

to matters of genuine public interest. He notes that the common law defence exists separately from the Act, and submits that the time has now come to recognise that publications about matters of genuine public interest (such as public safety, public finances, public health etc), provided that they are dealt with responsibly by the journalist/publisher concerned, should not be chilled by the threat of a defamation proceeding from a person who may be the subject of defamatory comment within such publications.

[77] Mr Stewart rejects the suggestion that such a development would open the door to the dissemination of serious allegations without proper factual enquiries being made, or natural justice being adhered to. In appropriate circumstances, the (expanded) defence would not be available where the journalism had not been "responsible".

[78] In response to Mr McLelland's point about the publication of a local issue online, Mr Stewart notes that the Act recognises that publication of a matter of public interest "in any place" in which the publication occurs is sufficient for the purpose of the statutory form of the defence. And if Dr Lupton were correct on her "width of publication" point, given the qualified privilege modern development of publishing material online, no local content could safely be disseminated from outside the local area to readers who may be interested. The dissemination of local news and information would inevitably be constrained.

[79] Mr Stewart refers to the developments of the qualified privilege defence in the United Kingdom and in Canada. In the United Kingdom, the Defamation Act 2013 now provides that it is a defence to a defamation claim to show that the statement complained of was a matter of public interest, and the defendant reasonably believed that publishing the statement was in the public interest. The Court has regard to all the circumstances of the case, and in particular, when deciding whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, must make allowance for editorial judgment.[19]

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[19] Defamation Act 2013 (UK), ss 4(2) and (4).

[80] In Canada, the Supreme Court in *Grant v Torstar Corp* has modified the common law of defamation by creating a defence called "responsible communication of matters of public interest".[20] The Supreme Court of Canada did not propose a definition of "public interest", but it is not confined to political matters. The authors of *Media Law in New Zealand* summarise the decision in *Grant* in the following terms:[21]

> …The subject matter must invite public attention or substantially concern the public because it affects the welfare of citizens or attracts considerable public notoriety or controversy. Some segment of the public must have a genuine stake in knowing about the matter. This element is not to be characterized narrowly.
>
> There are a number of factors which will be relevant to whether a public interest defamatory communication is made responsibly. These are: the seriousness of the allegation; the public importance of the matter; the urgency of the matter; the status and reliability of the source; whether the plaintiff's side of the story was sought and accurately reported; whether including the defamatory statement was justifiable; whether the statement's public interest lay in the fact it was made rather than its truth (reportage); and a catch-all category of other considerations where relevant.

Discussion and conclusions on Issue 2

[81] The learned authors of *Media Law in New Zealand* note that publications in the general news media are seldom covered by common law qualified privilege, because of the difficulty of "excess of publication". In its traditional form, the defence will only be available to the publisher of a statement to the extent that those to whom the statement is published have a genuine interest or concern in receiving the information.[22] An article in a newspaper, or a radio or television broadcast, will usually be received by many people who have no such interest or concern.

[82] The learned authors of *Gatley on Libel and Slander* note that a plea of qualified privilege will be struck out where the defendant plainly had no obligation to put the relevant defamatory allegations into the public domain, and a wide publication was clearly not warranted by the occasion.[23]

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20 *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640.

21 Ursula Cheer *Burrows and Cheer – Media Law in New Zealand* (7th ed, Lexis Nexis, Wellington, 2015) at 133.

22 At 123.

23 *Gatley on Libel and Slander,* above n 14, at 1144.

[83] In the first of the *Lange* decisions in the Court of Appeal, Richardson P and Henry, Keith and Blanchard JJ noted in their joint judgment that there must be a duty on or interest for the defendant to publish, and the publication's audience must not exceed those with an interest to receive it. The publication must not be too wide, and the protection of qualified privilege will be denied to the media at common law except where the public as a whole (or the section of it to which publication is made) has the relevant interest.[24]

[84] When the *Lange* case came back before the Court of Appeal in *Lange v Atkinson (No 2)*,[25] the Court of Appeal referred to the familiar duty/interest test articulated by Lord Atkinson in *Adam v Ward,* in the following terms:[26]

> …a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

[85] Their Honours also referred to *Stuart v Bell,* where Lindley LJ said:[27]

> The question of moral or social duty being for the judge, each judge must decide as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.

[86] The Court of Appeal in *Lange (No 2)* went on to note that a privileged occasion has to be an occasion in which the duty/interest test is satisfied.

[87] It is the *occasion* which is capable (or not as the case may be) of being regarded as one of qualified privilege. The fact that the subject-matter of a statement may qualify for protection (because the publisher and the recipients have a shared interest in that subject matter) does not necessarily mean that the publication will have been made on an *occasion* of privilege. Usually that will be so, but it will not necessarily be the case (the Court of Appeal in *Lange (No 2)* gave the example of a gratuitous slur published about a politician in a publication which was concerned

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24 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 437.
25 *Lange v Atkinson (No 2)*, above n 15.
26 *Adam v Ward* [1917] AC 309 at 334.
27 *Stuart v Bell* [1891] 2 QB 341 at 350.

with a quite different topic – an occasion of that sort does not attract common law qualified privilege).

[88] In *Lange (No 2)*, the Court of Appeal extended the previously understood scope of the qualified privileged defence in New Zealand by extending it to statements, published generally, in respect of the actions and qualities of actual or aspiring politicians, so far as those actions and qualities directly affected their capacities to meet their public responsibilities.

[89] The Court identified six conclusions about the defence of qualified privilege as it applies to such statements:[28]

> (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
>
> (2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
>
> (3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
>
> (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.
>
> (5) The width of the identified public concern justifies the extent of the publication.
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> …
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> (6) To attract privilege, the statement must be published on a qualifying occasion.

[90] *Lange (No 2)* was, in its terms, clearly concerned with political discourse.

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[28] *Lange v Atkinson*, above n 15, at [10] and [41].

[91] There have been a number of developments in the common law of qualified privilege since *Lange (No 2)*. In *Osmose New Zealand v Wakeling*, the High Court appeared to extend the defence by treating it as one based on the publication having been made in the public interest.[29] Osmose made and supplied timber preservative products and, the defendants were alleged to have made false and damaging statements about those products which were reported on Television New Zealand, Radio New Zealand, and in newspapers published by the two major print media publishers in New Zealand. These news media organisations were not sued by Osmose, but the defendants had joined them as third parties, seeking contribution or indemnity under s 17 of the Law Reform Act 1936.

[92] Harrison J found that the articles were published on occasions of qualified privilege, because the material published was of public concern. The learned Judge considered that the high national incidence of leaky homes, suggesting systemic failures in the building industry which had justified government intervention, and the significant rates of home ownership in New Zealand, meant that the published material was on a matter of public concern. That was particularly so as the government had endorsed Osmose's product following an inquiry into leaky homes.

[93] Harrison J considered that *Lange (No 2)* had relaxed the traditional limits of the qualified privilege defence, even where material had been disseminated to the public at large. That was especially so where the subject-matter could be loosely defined as of a political nature. The judge defined the inquiry as whether or not the factual conditions necessary to qualify for a shared interest in the publications existed.

[94] In *Chinese Herald Ltd v New Times Media Ltd*, the same Judge dealt with a case which was concerned with allegedly defamatory publications made in a Chinese -language newspaper which was published weekly in Auckland.[30] The defendants applied for leave to file an amended defence pleading qualified privilege after the case had been set down for trial. Leave to file the amended defence was declined on other grounds, but the Judge accepted that the defendants shared an

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[29] *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC).

[30] *Chinese Herald Ltd v New Times Media Ltd* HC Auckland CIV-2000-404-1568, 31 October 2003.

interest with the Chinese community in New Zealand in knowing the political orientation of the newspaper published by the plaintiffs, and the links the plaintiffs' newspaper had to the Chinese Communist Party. He accepted that an occasion of communication on that subject should be protected by qualified privilege. His Honour confirmed that it is the occasion which is privileged, rather than the communication itself or the publisher, however identification of the occasion required an examination of the nature of the material, the persons by and to whom it was published, and in what circumstances.[31]

[95] Mr Stewart referred to developments in the law of qualified privilege in the United Kingdom and Canada. Under the Defamation Act 2013 (UK), it is a defence to a defamation claim to show that the statement complained of was a matter of public interest, and that the defendant reasonably believed that publishing the statement was in the public interest. The Court is required to have regard to all the circumstances of the case, including whether it was reasonable for the defendant to believe that publishing the statement was in the public interest. Mr Stewart also referred to the development of the defence of "reasonable communication of matters of public interest" by the Supreme Court of Canada, in *Grant v Torstar Corp*.[32]

[96] Prior to being replaced by s 4 of the Defamation Act 2013, the defence of qualified privilege in the United Kingdom appears to have been broadened further with the more recent decision of the House of Lords in *Jameel v Wall Street Journal*.[33] The defence in that case was held to be broad enough to protect the material, rather than the occasion. The context of the article as a whole is used to determine public interest, so if an allegation is serious, the article has to make a real contribution to the matter of public interest.[34]

[97] Having regard to those developments, Mr Stewart submitted that the time has come to recognise that matters of genuine public interest (such as public safety, public finances, public health, etc) should be within the ambit of the qualified

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31 Applying *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 per Lord Hope at 229 – 235, and *Lange v Atkinson (No 2)*, above n 15, at [23].

32 *Grant v Torstar Corp*, above n 20.

33 *Jameel v Wall Street Journal* Europe [2006] UKHL 44, [2007] 1 AC 359.

34 At [46] and [51].

privilege defence, provided they are dealt with responsibly by the journalist/publisher concerned. He submitted that the publication should not be chilled by the threat of defamation from a person who may be the subject of defamatory comment within that publication. Mr Stewart went on to submit that such matters as the absence of proper enquiries, or the failure to seek comment, might be sufficient to deprive the journalist of the defence on the grounds that the journalism undertaken had not been "responsible", but that circumstance should not preclude the Court from extending the broad defence as a whole. In his submission it is clear that in the "more progressive parts of the common law world" the defence of common law qualified privilege has developed for the benefit of informing public discussion and debate in relation to matters of genuine public interest.[35] The time is right for a further development in the New Zealand law, under which the common law privilege defence would be extended to cover all general media publications on matters of public interest.

[98] The starting point in New Zealand cases that fall outside the already established occasions in which the privilege arises, is that it is a question for the Court, having regard to all the circumstances, whether an occasion should be regarded as privileged.[36] The ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between freedom of expression and protection of reputation accordingly.[37]

[99] In Fairfax's favour, recent High Court authority arguably does support the submission that common law qualified privilege is developing to encompass statements published generally about matters of public concern byond those related to representative and responsible government.[38] I therefore accept that it is arguable for Fairfax that, although the jurisprudential basis of the defence is yet to be fully articulated, and the appellate courts have not clarified its parameters, a more general

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35 Citing *Reynolds v Times Newspapers Ltd*, above n 31, *Jameel v Wall Street Journal*, above n 33, and *Grant v Torstar Corp*, above n 20.

36 *Karam v Parker* [2014] NZHC 737 at [208].

37 *Vickery v McLean* [2006] NZAR 481 (CA) per Tipping J, cited in *Karam v Parker* [2014] NZHC 737 at [208].

38 *Karam v Parker*, above n 36, at [201]–[214]; *Cabral v Beacon Printing & Publishing Company Ltd* [2013] NZHC 2584 at [28]; *Osmose New Zealand Ltd v Wakeling,* above n 28.

public interest-based qualified privilege defence may now be part of New Zealand law.

[100] But whatever form such an expanded defence might take, I think it must inevitably retain the requirement that the publication be concerned with matters that are of genuine public concern. The need for the subject-matter to be genuinely of public concern was accepted in *Lange (No 2)*, where the Court of Appeal held that there must be qualifying *subject-matter* as well as a qualifying occasion.[39] One of the Court's "conditions" was that the width of the "identified public concern" must justify the extent of the publication.[40] And as Tipping J observed in *Vickery v McLean,* the public interest value must be such that freedom of expression ought to prevail over reputational interests:[41]

> [18] … it is necessary for Mr Vickery to establish his asserted privilege by reference to first principles. He must show that it is in the public interest (for the common convenience and welfare of society as Parke B classically put it in *Toogood v Spyring* …) that on an occasion such as the present, freedom of expression should prevail over protection of reputation.

[101] The protection of reputational interest is not a consideration to be lightly dismissed in the balancing exercise which is required when considering the common law qualified privilege defence. As Associate Judge Bell found in *Cabral*, it is useful to reflect on the interests which the law of defamation is intended to protect. His honour referred[42] to the speech of Lord Nicholls in *Reynolds v Times Newspapers Ltd*, where his Lordship said:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to

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39 *Lange v Atkinson (No 2)*, above n 15, at [13].
40 Conclusion (5) in *Lange v Atkinson (No 2),* quoted at [89] of this judgment.
41 *Vickery v McLean*, above n 37.
42 *Cabral v Beacon Printing & Publishing Company Ltd*, above n 38, at [24].

> identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.

[102] Turning to the facts of this case, they are nothing like the facts in *Lange (No 2)*, or even *Osmose*. In both cases, there was genuine and legitimate nationwide interest in the subject-matter of the publications. And in *Chinese Herald Ltd*, Harrison J considered that the relatively narrow target audience (Chinese readers in New Zealand) had sufficient interest in the subject matter of the publication. There is nothing of that sort here. The subject-matter of the article arose from a most unusual and difficult set of circumstances which confronted a particular medical practitioner in the course of a private consultation with one of her patients.

[103] And in my view the subject matter of the article was less a matter of proper public interest or concern than the statements involved in *Cabral v Beacon Printing & Publishing Company Ltd,* where the qualified privilege defence was struck out. [43] In that case, Associate Judge Bell found that while an article on the development of a geothermal project requiring a very substantial investment and involving both community and commercial interests was newsworthy, and would have met any public interest requirement for a defence of honest opinion, it did not meet the high threshold of public interest necessary to attract the defence of a qualified privilege. The Associate Judge considered that something more was required – "something so important that it entitles the defendants to tell the readers of the Beacon about it even though it defames the plaintiff and is not true." His honour was unable to find any such "outranking element"[44] on the facts of the case.

[104] Fairfax knew from the Letter that Mrs Groombridge was approximately 20 weeks' pregnant at the time, had had two pregnancy tests previously, both of which returned negative results, and had experienced heavy bleeding in the period leading up to her consultation with Dr Lupton. The situation appears to have been highly unusual, and I do not think it could possibly have been concluded from the Letter that women in New Plymouth, or in the Taranaki area generally, needed to be warned

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43 *Cabral v Beacon Printing & Publishing Company Ltd*, above n 38.
44 At [36].

about Dr Lupton. The Letter recorded Dr Lupton's advice that it is very rare to discover a pregnancy of approximately 20 weeks if a patient denies symptoms of pregnancy, has received two negative home pregnancy tests, and has reportedly experienced regular periods. And the Deputy Commissioner herself acknowledged in the Letter the "significant difficulties in making the diagnosis, given what appeared to be regular periods, no other symptoms of pregnancy, and two negative pregnancy tests". The Deputy Commissioner concluded in the Letter that Dr Lupton's management (apart from not arranging for an urgent urine or blood test to exclude the possibility of pregnancy) had been "conscientious and appropriate".

[105] While the circumstances may have been of interest or concern to medical practitioners, I do not think it reasonably arguable that the subject-matter of the article was of public concern to readers of the *Taranaki Daily News* generally. Fairfax presumably took the view that this was a story with a high "human interest" factor, and that may well have been so. It may well have been "interesting" to the readers of the *Taranaki Daily News* (or "newsworthy" to adopt the language of Associate Judge Bell in *Cabral*), but that is not the same thing as saying that the subject-matter was of public interest or concern, sufficient to render Fairfax immune from a defamation suit if it happened to defame Dr Lupton in the article.

[106] This case is not about a situation where the publisher was concerned to inform public discussion and debate in relation to matters of genuine public interest, which was the broad justification Mr Stewart advanced for an extension of the defence. No topic for any such discussion or debate is suggested by the article, and nor was there any question of drawing to the attention of those who needed to know, some significant public safety or other national concern (as in *Osmose*). As I have said, this case is concerned only with a private consultation between a doctor and her patient, and I see no Taranaki-wide public concern or interest in the subject matter of the publication, such as might have justified the publication. There was nothing in what Fairfax had to tell readers of the article that was important enough to trump Dr Lupton's reputational interests.

[107] I do not consider the overseas developments to which Mr Stewart refers assist Fairfax. In *Grant* v *Torstar*, the Supreme Court of Canada made it clear that a

requirement of the new defence of "responsible communication on matters of public interest" was (as the name given to the defence suggests) that the publication had to *be* on a matter of public interest. The majority said:[45]

> First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject – say, the private lives of well-known people – is not on its own sufficient to render an essentially private matter public for the purposes of defamation law.

[108] The majority also noted that:[46]

> To be of public interest, the subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable notoriety or controversy has attached.

[109] I do not think it arguable for Fairfax in this case that the subject matter of the article was one which either affected the welfare of citizens (thus giving rise to substantial public concern), or was one to which "considerable notoriety or controversy" had attached.

[110] Nor can recourse to developments in the United Kingdom afford Fairfax any arguable common law qualified privilege defence. The House of Lords made it clear in *Jameel* that the subject matter of the publication must be of real public interest. Their Lordships variously referred to "the value of informed public debate of *significant public issues*,"[47] the "duty/interest test based on *the public's right to know*, which lies at the heart of the matter"[48], and the publication of information "that the public as a whole, as opposed to a specific individual or individuals, was *entitled to know'*"[49] (emphasis added in each case). And Baroness Hale considered that, as a first condition for the expanded defence to apply, there must be a "real public interest in communicating and receiving the information". [50]

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45 *Grant* v *Torstar Corp*, above n 20, at [102].
46 At [105].
47 *Jameel* v *Wall Street Journal Europe*, above n 33, at [28], per Lord Bingham of Cornhill (referring to the decision of the House of Lords in *Reynolds*).
48 At [106], per Lord Hope of Craighead.
49 At [130], per Lord Scott of Foscote, referring to the speech of Lord Nicholls in *Reymolds*.
50 At [147].

[111] The Defamation Act 2013 (UK) abolished the so-called *Reynolds* defence and substituted a new defence of "publication on a matter of public interest". But this new defence still requires that the statement complained of must have been or formed part of a statement on a matter of public interest.[51]

[112] Accordingly, I conclude that, whether on the law as it presently stands or as it might reasonably be developed, there is no reasonable prospect of Fairfax's common law qualified privilege defence being upheld at trial.

[113] In reaching that conclusion, I am acutely aware that the Court's approach to strike-out applications in developing areas of law should be cautious. But I am satisfied that striking out the defence is the proper course to take in this case. The subject-matter of the article, and the occasion of its publication, were clearly not of sufficient public interest or concern to justify Taranaki-wide publication in a daily newspaper.

[114] There will accordingly be an order striking out the common law qualified privilege defence.

Result

[115] I make orders striking out both of the qualified privilege defences. In those circumstances, there is no need to deal with Dr Lupton's application under s 41 of the Act.

[116] Dr Lupton is entitled to costs, which are awarded on scale 2B, plus disbursements as fixed by the Registrar.

Associate Judge Smith

Solicitors:
DLA Piper, Wellington for plaintiff
Izard Weston, Wellington for defendant

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[51] Defamation Act 2013 (UK), s. 4(1)(a).