ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF THE APPELLANT AND THE RESPONDENT UNTIL THE FINAL DISPOSITION OF TRIAL REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA528/2021
[2022] NZCA 181

BETWEEN	S Appellant
AND	W Respondent

Hearing:	13 April 2022
Court:	Clifford, Collins and Goddard JJ
Counsel:	G L Turkington for Appellant SRG Judd for Respondent
Judgment:	12 May 2022 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

C We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] The issue we are required to determine is encapsulated in the following question: Did the High Court err when it concluded that a complaint about a doctor, lodged with the doctor's employer, was protected by qualified privilege and not absolute privilege?

[2] The question arises in the context of the doctor suing the complainant for defamation over the contents of the complaint. In the District Court, Judge Cathcart held that the complaint was protected by absolute privilege and he therefore struck out those aspects of the statement of claim that were said to be covered by absolute privilege.[1] The doctor appealed to the High Court, where Dobson J determined the complaint was covered only by qualified privilege.[2] The High Court Judge therefore reinstated all of the statement of claim. For completeness, we record that although Grice J declined leave for the complainant to appeal,[3] this Court granted an application by the complainant to bring a second appeal because the proposed appeal raised a question of general public importance and was "not incapable" of succeeding.[4]

[3] To date, the parties have had the benefit of name suppression. We will continue to use the same method of anonymisation used in the courts below.

Background

[4] W is a physician who, at the relevant time, was employed by a provincial District Health Board (the DHB). S was a patient of the DHB but not under the care of W. S complained to the DHB that W accessed her medical records without her consent and that W had, on numerous occasions, behaved inappropriately towards S

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1 *[W] v [S]* [2020] NZDC 13425 [District Court judgment].
2 *W v S* [2020] NZHC 3418 [High Court judgment].
3 *W v S* [2021] NZHC 1908 [High Court leave judgment].
4 *S v W* [2021] NZCA 674 [Court of Appeal leave judgment] at [6].

by intimidating her. W's response was that she accessed S's records at the request of S so as to assist S in getting clinical services from the DHB and that she never intimidated S.

[5] For a number of years W was in a relationship with I, another doctor employed by the DHB. When the relationship between W and I came to an end, S and I started a relationship which lasted approximately two months. It was while S and I were in their relationship that W says S asked her to examine her medical records. According to W, this request occurred when W visited I at his home. S was also at I's home. W says:

> [S] told me about her abnormal smear results and that she was worried about the long delay before an appointment at the hospital. She wanted to know how bad the results were and asked me to access her hospital records to look at the results and give her my opinion. I did as she asked. I had no other interest in her smear results.

[6] I verifies W's account of events. He has records of various texts that S sent to him around the time his relationship with S came to an end. In those messages S expressed her anger about W. Amongst other statements, S told I that she "hate[d]" W; W had been sleeping with other doctors behind I's back "for years"; W needed to be "permanently out of [I's] life forever"; W "need[ed] to go [f]rom this town"; S did not want I working with W; W "made the wrong move messing with [S]"; and S would "gladly run [W] over".

[7] After investigating S's complaint, the DHB concluded:

(a) W had breached the DHB's Code of Behaviour by accessing S's records without her consent.

(b) It was not possible to determine whether or not W had acted in inappropriate ways towards S.

[8] W was not satisfied she received a fair hearing from the DHB. She was concerned she did not have an adequate opportunity to present her case. She left her employment and the town where the events occurred and negotiated a confidential settlement with the DHB for constructive dismissal.

[9] The DHB then referred matters to the Medical Council of New Zealand (the Medical Council), which in turn referred the case to a Professional Conduct Committee (the PCC) pursuant to s 68(1) of the Health Practitioners Competence Assurance Act 2003 (the Act), to investigate W's conduct. The Medical Council invited the PCC to consider the circumstances in which "[W] repeatedly access[ed] the medical records of a patient not under her care, namely [S], … without clinical justification". If it considered W's conduct amounted to professional misconduct, the PCC could lay a charge against W with the Health Practitioners Disciplinary Tribunal (the Tribunal).

[10] The PCC has yet to determine whether or not a charge should be referred to the Tribunal. We understand the delay is due to the PCC awaiting the determination of this appeal.

Defamation proceedings

[11] In September 2019, W commenced defamation proceedings against S in the District Court. In her proceeding, W seeks a declaration that she was defamed by S and that her solicitor and client costs be paid by S pursuant to s 24(2) of the Defamation Act 1992. No damages are sought.

[12] The defamatory statements identified in the statement of claim can be conveniently divided into two sets of allegations:

(a) the comments S made to I, in particular the allegation that W had been sleeping with other doctors when she was in her relationship with I; and

(b) the complaint S made to the DHB that W had accessed her medical files without the consent of S.

[13] In her statement of defence, S has pleaded the statements made by her complaint to the DHB were protected by absolute privilege. It is only this aspect of the pleadings that we are concerned with.

District Court judgment

[14] Judge Cathcart reasoned that, as statements made before the Tribunal are protected by absolute privilege, statements that form part of the steps leading to a disciplinary hearing should also be protected by absolute privilege. The Judge said:[5]

> If protection of absolute privilege is essential to the administration of justice at the end, steps incidental to and necessary to it must extend the privilege to the relevant first necessary step.

High Court judgment

[15] Dobson J observed that the common law "is reluctant to allow expansion of the categories of circumstances in which absolute privilege will apply".[6] The Judge explained that two lines of authority can be identified concerning the circumstances in which absolute privilege has been held to apply:

(a) The first line of authorities extends absolute privilege to steps that are linked to or form "part of a pipeline of steps that may result in proceedings before a quasi-judicial body (usually of a disciplinary character)".[7]

(b) The second line of authorities draws a distinction "between preliminary communications to a body that may be one or more steps away from any quasi-judicial process, and utterances that are actually part of a quasi-judicial process. On this approach, absolute privilege only applies in the latter circumstance where utterances are a component of the quasi-judicial process".[8]

[16] The High Court Judge recognised there was a material change in focus between S's complaint to the DHB and the terms of reference from the Medical Council to the PCC. The complaint to the DHB alleged W had accessed S's medical records without her consent. On the other hand, the matter being investigated by the PCC is "the

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5 District Court judgment, above n 1, at [81].
6 High Court judgment, above n 2, at [31].
7 At [32].
8 At [33].

circumstances around the appellant repeatedly accessing the medical records of [S], a patient not under her care, without clinical justification".[9]

[17] Dobson J concluded that the communications in the period between S's complaint to the DHB and the investigation by the PCC were not sufficiently close to extend the absolute privilege that would apply before the Tribunal back to S's original complaint to the DHB.[10] The Judge was satisfied that "recognition of the complaint occurring on an occasion of qualified privilege is a sufficient protection for genuine complainants in the position of [S]".[11]

The appeal

[18] Mr Turkington, counsel for S, submitted Judge Cathcart correctly reasoned that the complaint by S to the DHB was the first of a number of closely linked steps in a process that could lead to W facing a disciplinary hearing before the Tribunal.

[19] Mr Turkington relied on this Court's judgment in *Teletax Consultants Ltd v Williams*, in which a letter from the appellant to the President of the Wellington District Law Society about the conduct of a solicitor was held to be protected by absolute privilege because the letter was integral to the commencement of the complaints procedure under the Law Practitioners Act 1982.[12] Mr Turkington argued that, in principle, there was no distinction between the complaints sent by Teletax Consultants Ltd (Teletax) and the complaint sent by S to the DHB in this case.

[20] Mr Judd, counsel for W, submitted that the approach taken by Dobson J was orthodox and ought to be upheld. He argued that the letter sent by S to the DHB was two steps removed from any possible hearing before the Tribunal and that the absolute privilege that applies to those proceedings, if they eventuate, should not be extended to S's complaint to the DHB, particularly as qualified privilege provides sufficient protection to complainants who are properly motivated when lodging complaints with a DHB.

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9 At [26].
10 At [53].
11 At [54].
12 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA).

The law

[21] Usually a person who believes their reputation has been damaged by false statements made by another has the option of seeking redress under the law of defamation. There are, however, instances in which the law of defamation protects a defendant from liability because of the advantages to society of allowing, in limited circumstances, a person to make statements without the fear of being sued. As is apparent from earlier paragraphs in this judgment, two forms of privilege are recognised, namely, absolute privilege and qualified privilege.

[22] Absolute privilege provides complete protection even though the statement in question was made dishonestly or knowing that it was false.

[23] Examples of absolute privilege include anything said by a witness in a court of law. This reflects the well-entrenched policy of the common law that witnesses before a court should "give their testimony free from any fear of being harassed by an action on an allegation, *whether true or false*, that they acted from malice".[13]

[24] The common law also recognised absolute privilege could, on occasions, apply to statements made by witnesses in quasi-judicial proceedings. That concept is now recognised in s 14(1) of the Defamation Act, which states:

> **14 Absolute privilege in relation to judicial proceedings and other legal matters**
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> (1) Subject to any provision to the contrary in any other enactment, in any proceedings before—
>
> (a) a tribunal or authority that is established by or pursuant to any enactment and that has power to compel the attendance of witnesses; or
>
> (b) a tribunal or authority that has a duty to act judicially,—
>
> anything said, written, or done in those proceedings by a member of the tribunal or authority, or by a party, representative, or witness, is protected by absolute privilege.
>
> …

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[13] *Trapp v Mackie* [1979] 1 WLR 377 (HL) at 379 per Lord Diplock, citing *Dawkins v Lord Rokeby* (1875) LR 7 HL 744 (HL) at 753.

[25] The essence of s 14(1) of the Defamation Act may also be found in a number of statutes that create disciplinary tribunals. An example concerns statements in evidence given before the Tribunal. Clause 11 of sch 1 of the Act provides:

> **11 Privileges and immunities**
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> (1) Every person has the same privileges in relation to the giving of information to the Tribunal, the answering of questions put by the Tribunal, and the production of papers, documents, records, and things to the Tribunal that witnesses have in courts of law.
>
> (2) Witnesses and counsel appearing before the Tribunal have the same privileges and immunities that witnesses and counsel have in proceedings in the District Court.

[26] Qualified privilege, as its name suggests, provides a more limited form of protection. In general, qualified privilege can be overcome if the plaintiff proves that the statement in question was "predominantly motivated by ill will towards the plaintiff" or otherwise involved the taking of "improper advantage of the occasion of publication".[14] We say "in general" because a number of legislative provisions also confer qualified privilege on statements made to statutory investigatory bodies, adopting various different but overlapping formulations. In the present case, the Act regulates the scope of the privilege that applies to complaints made to the Medical Council and a PCC.

[27] The reference by the DHB to the Medical Council in the present case was governed by s 34(3) and (4) of the Act. Those sections provide:

> **34 Notification that practice below required standard of competence**
>
> …
>
> (3) Whenever an employee employed as a health practitioner resigns or is dismissed from his or her employment for reasons relating to competence, the person who employed the employee immediately before that resignation or dismissal must promptly give the Registrar of the responsible authority written notice of the reasons for that resignation or dismissal.
>
> (4) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.

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[14] Defamation Act 1992, s 19.

[28] The qualification in s 34(4) that allows proceedings against a person who complains to the Medical Council in circumstances where the complaint is motivated by "bad faith" equates to "ill will" or "improper advantage" which are the principal characteristics of qualified privilege set out in s 19 of the Defamation Act.

[29] Similarly, evidence or statements made to a PCC are also protected by qualified privilege. Section 76(7) of the Act provides:

> **76 Professional conduct committees may receive evidence**
>
> …
>
> (7) No civil or disciplinary proceedings lie against any person in respect of any evidence given, or statements or submissions made, under this section by that person, unless the person has acted in bad faith.

[30] Lord Atkin observed in *O'Connor v Waldron* that the line dividing cases that enjoy the protection of absolute privilege from cases that do not is one "not capable of very precise limitation".[15]

Analysis

Relevant principles

[31] In assessing whether or not S's complaint to the DHB attracts absolute privilege, we have been guided by the following four closely intertwined principles.

[32] First, as explained by the Supreme Court in *Attorney-General v Leigh*:[16]

> Where the claim for absolute privilege would result, if successful, in depriving citizens of their common law rights [to sue for defamation], the courts will be astute to ensure that the claimed absolute privilege is truly necessary …

[33] Second, the law of defamation in New Zealand reflects art 17(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR) which provide:[17]

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15 *O'Connor v Waldron* [1935] AC 76 (PC) at 81.

16 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [7].

17 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

(a) "No one shall be subjected to … unlawful attacks on [their] honour and reputation"; and

(b) "Everyone has the right to the protection of the law against such … attacks".

[34] When commenting on these principles in the context of an attempt to extend absolute privilege to a letter of complaint sent to the Attorney-General of Australia about the conduct of a Magistrate, Kirby J said "[t]he common law of Australia should be developed by the courts to uphold such basic principles to the fullest extent possible".[18] Those remarks apply with equal effect to the law of New Zealand.

[35] Third, in deciding whether or not S's complaint to the DHB was protected by absolute privilege, every effort should be made to ensure the common law aligns with relevant legislative provisions, and in particular, those sections of the Act that provide communications from the DHB to the Medical Council and communications to the PCC are protected by qualified privilege.

[36] Finally, it is necessary to assess whether qualified privilege provides adequate protection in the circumstances of this case or whether it is necessary to clothe S's complaint with absolute privilege in order to ensure complainants and DHBs can properly and effectively discharge their duties.

Applying the principles in this case

[37] It is significant that the letter of complaint was sent to W's employer. The clear intention of S was to have her concerns dealt with as an employment issue. Dobson J correctly noted "[t]here is no suggestion that [S] intended [when making the complaint] to do [anything] more than discredit [W] with her employer".[19]

[38] There were other avenues of complaint available to S had she wished to initiate professional disciplinary proceedings against W. She could, for example, have written to the Health and Disability Commissioner (the Commissioner).

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18 *Mann v O'Neill* (1997) 191 CLR 204 at 257.
19 High Court judgment, above n 2, at [23].

[39] Had S laid her complaint with the Commissioner then her case would have been closely aligned to the facts in *Teletax*,[20] where the letter of complaint was written to the President of the Wellington District Law Society in the expectation it would initiate disciplinary proceedings.

[40] *Teletax* is readily distinguishable from the present case because Teletax did not complain to the practitioner's employer, but instead set out to trigger disciplinary action with the Wellington District Law Society.

[41] As we have noted at [18]—[19], Mr Turkington argues that because any evidence or statement S provides the Tribunal will be protected by absolute privilege, then the same privilege should extend to S's complaint to the DHB.

[42] The lacuna in Mr Turkington's argument is that, before any charge could be laid with the Tribunal, the PCC would need to gather evidence and satisfy itself that the case merits disciplinary action. That process would involve the PCC obtaining evidence from S. Anything she said to the PCC would only attract qualified privilege.

[43] Similarly, the PCC has only become seized of matters because of the referral from the Medical Council which in turn became involved after receiving communications from the DHB. The communications from the DHB to the Medical Council only attracted qualified privilege.

[44] Parliament has not conferred absolute privilege on communications from the DHB to the Medical Council or in relation to any statement or evidence that S provides to the PCC. Those communications, evidence or statements occur in steps that are more proximate to any hearing before the Tribunal than S's complaint to the DHB.

[45] There is no convincing reason why the absolute privilege that applies to proceedings before the Tribunal should extend to S's complaint to the DHB when the essential intermediary steps are only covered by qualified privilege. On the contrary, it would be the antithesis of Parliament's clear intentions if we were to extend absolute privilege to S's communications made in the context of an employment issue in

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[20] *Teletax Consultants Ltd v Williams*, above n 12.

circumstances where anything she said to the investigating body responsible for determining if a charge should go to the Tribunal was only protected by qualified privilege.

[46] Nothing advanced on behalf of S convinces us that we should extend the scope of absolute privilege to cover S's complaint to the DHB when the consequence of doing so will be to deprive W of a significant plank in her defamation action against S. If we were to extend absolute privilege to the circumstances of this case, we would be undermining the objectives of art 17(1) and (2) of the ICCPR and creating anomalies in the scheme of the relevant legislation. Absent any compelling reasons, we are not willing to do so.

[47] Finally, we are satisfied that the interests of health consumers and the community are adequately protected if those who wish to lodge a complaint about a health professional employed by a DHB have the protection of qualified privilege set out in s 19 of the Defamation Act when directing their concerns to the DHB. Complainants in those circumstances will only be liable for defamation if it can be established they were motivated by ill-will towards the person who is the subject of the complaint or if they otherwise have taken improper advantage of the opportunity to complain. There is no reason to believe that genuine complainants will be dissuaded from presenting any legitimate concerns they have to a DHB about a health professional employed by that DHB if the complaint is covered only by qualified privilege.

Result

[48] The appeal is dismissed.

[49] We understand that the appellant is legally aided. In these circumstances, we make no order as to costs.

[50] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet

or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

Solicitors:
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