

## ROBERTS & ANOR v BASS

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In *Roberts v Bass*<sup>1</sup> the High Court considered the balance between freedom of expression in political and governmental matters, and defamatory publication during an election campaign.

The Respondent, Mr Bass stood for re-election to the seat of Florey during the 1997 South Australian state election. During the course of the campaign an elector, Mr Roberts, authorised the publication of three documents designed to damage Mr Bass' chances of re-election. These three documents were:

1. the Nauru postcard, a mock-up of a postcard stating 'Greetings from Nauru' and referring to Mr Bass' parliamentary trip to Nauru;
2. the Free Travel Times pamphlet which included a caricature of Mr Bass and a forged Ansett Frequent Flyer record purporting to show Mr Bass' travel during his time in office; and,
3. the Orange Pamphlet, a 'how-to-vote' card containing several statements about Mr Bass' policies and parliamentary activities.

The second appellant, Mr Case, had distributed the Orange Pamphlet at a polling booth for several hours on 11 October 1997, the day of the election. Many of the allegations made in the three documents were untrue.

Mr Bass brought an action for defamation in the District Court of South Australia. Lowrie DCJ held at first instance that Mr Roberts had defamed Mr Bass in each of the three documents, and that Mr Case had also defamed Mr Bass by distributing the Orange Pamphlet. Each publication was found to have a number of defamatory meanings.

On appeal to the Full Court of the Supreme Court of South Australia<sup>2</sup> Martin, Prior and Williams JJ upheld the decision. Though their reasoning differed, their Honours shared the view that the publications were actuated by malice and as a consequence the defence of qualified privilege was not available to the Appellants.<sup>3</sup>

In the District Court the Appellants had argued that the publications were protected by common law qualified privilege and by the extension of qualified privilege made in *Lange v. Australian Broadcasting Corporation*.<sup>4</sup> They also argued that the defence of fair comment protected the publications. Before the Supreme Court the parties did not make submissions as to the *Lange* extension, nor did they make submissions on fair comment.

On appeal to the High Court key issues were:

1. the interaction of common law defamation and the constitutional protection of freedom of communication;
2. the scope of qualified privilege as a defence to defamatory comments made during an election campaign; and,
3. the categorisation of the publication as malicious given the 'robust' nature of electoral campaigns.

The underlying question was, what effect did the extension of qualified privilege in *Lange* have on the legal position between the parties. This underlying question was, however, obscured partially by the conflicting approaches of the majority and minority. Although the majority considered the *Lange* extension, to a large extent the minority did not do so.<sup>5</sup> This was because, the parties had accepted that the occasion gave rise to

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<sup>1</sup> *Roberts v Bass* (2003) 212 CLR 1; [2002] HCA 57 (12 December 2002).

<sup>2</sup> *Roberts v Bass* (2000) 78 SASR 302.

<sup>3</sup> *Ibid* 304–305 (Prior J), 314–316 (Williams J), 325–326 (Martin J).

<sup>4</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>5</sup> *Roberts v Bass* (2003) 194 ALR 161, 219 (Hayne J); cf 240 (Callinan J).

qualified privilege and the appeal centred on whether the qualified privilege had been defeated by malice on the part of Mr Roberts and Mr Case.

Before the High Court, both parties sought to make submissions as to whether qualified privilege arose. Gleeson CJ, Callinan and Hayne JJ did not believe that such submissions should have been allowed. On this point Gaudron, McHugh and Gummow JJ concurred. In contrast though, they held that submissions on *Lange* could still be made.<sup>6</sup> The net effect of the contrasting positions of the majority and minority is that the underlying question of the appeal is partially obscured. It is the answer to this question however, which has the greatest implications for the law of defamation and the Constitutional protection of freedom of communication.

## I. THE INTERACTION OF DEFAMATION AND THE CONSTITUTIONAL FREEDOM

At common law the defence of qualified privilege protects the publication of otherwise defamatory material when the statement-maker 'has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it'.<sup>7</sup> The defence is qualified to the extent that the occasion must not be used for a purpose or motive other than the duty or interest giving rise to the protection.

In cases such as *Australian Capital Television Pty Ltd v The Commonwealth*<sup>8</sup> the High Court recognised that the Constitution granted an implied freedom of communication in political and governmental matters. This freedom is a necessary implication of Australia's democratic system of government. Subsequent cases led to the development of a distinct constitutional defence — the *Theophanous* defence — based on this constitutional implication.<sup>9</sup> The impact of such decisions on defamation law was considered in *Lange*, where the High Court held that communications on political and governmental matters would be occasioned by privilege so long as the content of the communication was reasonable.<sup>10</sup>

In *Lange* the High Court considered the law of defamation in light of the recently revealed freedom of political communication protected by the Constitution. In that case, the Australian Broadcasting Corporation (ABC) had broadcast nationally a programme containing defamatory material concerning the then New Zealand Prime Minister. The ABC's submissions relied on the so-called *Theophanous* defence arising out of the constitutional protection of freedom of political communication. In their decision the High Court extended the defence of qualified privilege in light of this freedom. This came to be known as the *Lange* extension, and protected certain publications to the public at large.<sup>11</sup>

In *Roberts v Bass*, as an incidental but critical question, the High Court judges had to determine whether the *Lange* extension was a distinct and separate privilege or an expansion of the existing common law defence. The majority justices concurred in treating the *Lange* extension as an expansion of the existing defence. For the minority justices it was a distinct occasion on which privilege arose.

Gaudron, McHugh and Gummow JJ held that *Lange*, 'requires that the rules of the common law conform with the Constitution, for 'the common law in Australia cannot run counter to constitutional imperatives'.<sup>12</sup> That is, the common law must conform to Constitutional principles — where it does not, the common law requires adaptation, and *Lange* is an example of such adaptation occurring. For this reason, the *Lange* extension represented, not the development of a distinct defence, but an expansion of the existing defence,

<sup>6</sup> Ibid 178-179.

<sup>7</sup> Ibid 176 (Gaudron, McHugh and Gummow JJ).

<sup>8</sup> (1992) 177 CLR 106; see also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>9</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

<sup>10</sup> *Roberts v Bass* (2003) 194 ALR 161, 177 (Gaudron, McHugh and Gummow JJ).

<sup>11</sup> Ibid 218 (Hayne J).

<sup>12</sup> Ibid 177 (Gaudron, McHugh and Gummow JJ).

which was required to deliver the requisite conformity between the common law and constitutional imperatives.

On this point Kirby J was emphatic:

... it is only possible to have one legal rule. That is the rule of the common law adapted to the Constitution. Any narrower, or other, common law rule cannot survive. Putting it quite bluntly, in the context of a case such as the present, because of the Constitution, such a rule does not represent the common law at all.<sup>13</sup>

One of the key issues that appeared to have been resolved by the unanimous decision in *Lange* was the manner in which the Constitution interacts with the common law. However, the diverse opinions in *Roberts v Bass* suggest that the determination in *Lange* may be open to review.

Kathleen Foley<sup>14</sup> identifies two possible ways in which the Constitution could interact with the common law. The Constitution could mandate common law development in a particular manner, or alternatively, could serve as a mere influence.<sup>15</sup> *Lange* resolved that the common law must be shaped to conform to the Constitution's requirements.<sup>16</sup> In doing so the High Court established the Constitution as the 'basic law' of Australia.<sup>17</sup>

Chesterman<sup>18</sup> views the *Lange* decision as endorsing a methodological approach which favours conformity between the common law and the Constitution. Thus, according to *Lange*, Constitutional imperatives operate to confine the potential development of the common law.<sup>19</sup> In the context of qualified privilege this view specifically rejects the possibility of a separate Constitutional defence. Rather, there is the common law defence which is adapted to conform to Constitutional requirements.

Nonetheless, the dissentients all treated the *Lange* extension as a separate occasion of privilege distinct from the common law defence.<sup>20</sup> And, because they held the parties to their pleadings they did not consider whether such an occasion arose. Although the dissenting justices contend that their refusal to consider *Lange* represents fidelity to the appeals process,<sup>21</sup> such a refusal presents a paradox. If the *Lange* extension is distinct, then their Honours' refusal does represent fidelity to the appeal process. However, if *Lange* represents an expansion, then their Honours have simply refused to hear material relevant to the appeal.

The minority justices contend that there are two coexisting defences of qualified privilege, the common law defence and the *Lange* Constitutional defence. These must be pleaded separately. Because the pleadings before the Full Court of the Supreme Court of South Australia did not include submissions on *Lange* the minority refused to consider what they viewed to be a separate defence.

However, if one accepts that the *Lange* extension is not a distinct Constitutional defence, but an adjustment of the common law defence of qualified privilege so that it conforms to Constitutional imperatives there is nothing to prevent the Court considering the '*Lange* defence'. This is because the (sole) defence of qualified privilege has been raised although *Lange*, a component of it, has not. To neglect the impact of *Lange* is to utilise the common law at a historically fixed moment in its development.

<sup>13</sup> Ibid 203 (Kirby J); see also 199 (Kirby J).

<sup>14</sup> Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31(1) *Federal Law Review* 131.

<sup>15</sup> Ibid 132.

<sup>16</sup> Ibid 138.

<sup>17</sup> Ibid 164.

<sup>18</sup> Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 66.

<sup>19</sup> Ibid 65.

<sup>20</sup> Ibid 163–164 (Gleeson CJ); 218–219 (Hayne J); 231 (Callinan J).

<sup>21</sup> See *Roberts v Bass* (2003) 194 ALR 161, 233–237 (Callinan J).

According to Chesterman,<sup>22</sup> and other commentators,<sup>23</sup> *Lange* made clear that there was one defence of qualified privilege, and that the defence was shaped by the Constitution's requirements. The opinions in *Roberts v Bass* re-open the debate.

Helen Chisholm<sup>24</sup> notes that in *Roberts v Bass* the majority view of *Lange* was that 'the common law was modified and it would be incorrect to rely on the law as it was prior to the modification',<sup>25</sup> whereas the minority view *Lange* as having made available an additional defence on which defendants may choose to rely.<sup>26</sup> Chisholm examines *Lange* and concludes that the High Court was there developing the common law and was not creating a new defence.<sup>27</sup>

If this is the case, the minority in *Roberts v Bass* err in law. They have made a decision that the *Lange* extension is a separate defence and that therefore fidelity to the appeals process prevents them from hearing submissions on the case. Yet the content of *Lange* reveals that this is not so.

Overall, the majority position is that the *Lange* extension expands the common law defence of qualified privilege. As a consequence, there is normally a privilege protecting communications on political and governmental matters made during the course of an election campaign even if those communications have a defamatory content. However, the qualification remains that the privileged occasion must not be utilised for a foreign purpose.

## II. REASONABLENESS

*Roberts v Bass* contains extensive consideration of communications made during election campaigns. While their Honours recognise that such communications must still be reasonable<sup>28</sup> they contextualise 'reasonableness' within the electoral process. As Kirby J notes:

Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest.<sup>29</sup>

He then goes on to reason that:

Because this is the real world in which elections are fought in Australia, any applicable legal rule concerning qualified privilege (and the related notion of malice) must be fashioned for cases such as the present to reflect such electoral realities.<sup>30</sup>

Or, as Gaudron, McHugh and Gummow JJ put it, '[n]o matter how irrational [Robert's] reasoning might seem to a judge, it is unfortunately typical of "reasoning" that is often found in political discussions.'<sup>31</sup> Unfortunately, the practical effect of the contextualisation of reasonableness within the confines of political discussions would appear to be that a virtual *carte blanche* has been granted during election campaigns.

Such a proposition is reflected in the opinions of the minority judges. Callinan J in particular expresses concern that too broad a privilege will be detrimental to the democratic process. As he states:

<sup>22</sup> See Chesterman, above n 18.

<sup>23</sup> See above n 14; Erin O'Dwyer, 'Qualified Privilege and Public Leaders in Political Debate: Diverging Defamation Law after *Lange*' (2003) 8(2) *Media and Arts Law Review* 91; Helen Chisholm, 'The Stuff of Which Political Debate is Made' (2003) 31(1) *Federal Law Review* 225.

<sup>24</sup> Chisholm, above n 23.

<sup>25</sup> *Ibid* 235.

<sup>26</sup> *Ibid* 236.

<sup>27</sup> *Ibid* 237.

<sup>28</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 573.

<sup>29</sup> *Roberts v Bass* (2003) 194 ALR 161, 206 (Kirby J).

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*, 191 (Gaudron, McHugh and Gummow JJ); see also 219 (Hayne J).

There is no public interest in the purveying of falsehoods. It would be a sad day if elections were to provide an excuse for dishonesty. Free speech does not mean freedom to tell lies, or a holiday from the truth during an election campaign. To the contrary, honesty of purpose and language and the taking of reasonable care in the dissemination of material can only enhance the electoral process and good, responsible and representative government. The interest of electors is not in being misled, but in having 'what is honestly believed to be the truth communicated'.<sup>32</sup>

Justice Callinan's powerful criticism of the effect of the majority position represents a categorical rejection of the majority opinions. With respect to the majority justices, it is possible that Justice Callinan's view more closely matches social expectations, and although Kirby J indicates the need for law to evolve with society,<sup>33</sup> the majority position goes far beyond what is necessary for the 'common convenience and welfare of society'.<sup>34</sup>

### III. MALICIOUS PURPOSES

The question of reasonableness is interwoven with the question as to malice to the extent that both serve to limit the application of privilege. As noted earlier, a privileged occasion is 'qualified' in that it must not be used for a purpose other than the purpose for which the privilege is granted. Malice is an improper purpose and will preclude privilege from arising. The malice must however have actuated the making of the statement.<sup>35</sup>

Malice can be demonstrated in numerous ways, two of which are considered in detail in *Roberts v Bass*. Their Honours consider whether the making of defamatory statements for the purpose of diminishing a candidate's electoral prospects is an occasion of malice. They also consider whether the making of untrue statements is malicious.

On the first matter there is general agreement that making defamatory statements for the purpose of reducing a candidate's electoral stocks cannot be an occasion of malice. This is because election campaigning is for this very purpose. On the second matter however, the Court is divided. For the majority, knowledge that a statement is false is 'almost conclusive proof' that there is underlying malice.<sup>36</sup> But, knowledge of falsity and lack of belief in the truth cannot be equated.<sup>37</sup> They draw a fundamental distinction between not knowing whether a statement is true and knowing a statement is untrue. Only the latter presents almost conclusive proof of malice from which it can be inferred that an improper purpose actuated the publication.

The minority reason that publication without knowledge of truth is reckless and that therefore malice can be inferred. They also reason that the statement-maker is able to check the veracity of a statement and should therefore do so. However, due to the 'robust' nature of election campaigning and the roles played by volunteers it is unrealistic to expect people to check every publication for veracity.<sup>38</sup> The majority reason that the electoral process relies on volunteers to distribute material and campaign on behalf of candidates, and therefore:

To hold such persons liable in damages for untrue defamatory statements in that material because they had no positive belief in their truth would be to impose a burden that is incompatible with the constitutional freedom of communication.<sup>39</sup>

The overall effect is that malice is more difficult to establish in political matters than on other occasions where common law privilege arises.

<sup>32</sup> Ibid 241 (Callinan J).

<sup>33</sup> Ibid 194 (Kirby J).

<sup>34</sup> Ibid 194 (Kirby J), citing *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632, 654–658, citing *Toogood v Spyring* (1834) 1 CM & R 181, 193.

<sup>35</sup> Ibid 179–180 (Gaudron, McHugh and Gummow JJ).

<sup>36</sup> Ibid 183 (Gaudron, McHugh and Gummow JJ).

<sup>37</sup> Ibid 183–184 (Gaudron, McHugh and Gummow JJ).

<sup>38</sup> Ibid 210 (Kirby J).

<sup>39</sup> Ibid 187–188 (Gaudron, McHugh and Gummow JJ).

#### IV. CONCLUSION

In *Roberts v Bass* three central issues before the Court were resolved as follows:

1. The *Lange* extension is an expansion of common law qualified privilege. The extended defence protects statements on political and governmental matters so long as the statements are reasonable and not for an improper purpose.
2. Statements made during the course of an election campaign are granted a qualified privilege that allows substantial scope for the publication of otherwise defamatory comments.
3. Statements made for the purpose of diminishing the standing of a candidate cannot be improper because this is the very purpose of election campaigns. Nor can comments made without knowledge of truth be viewed as malicious unless there is knowledge of actual falsity. This is due to the centrality of volunteers to election campaigns.

The Court held that, in light of the above, and drawing on *Lange*, Mr Case had not defamed Mr Bass because the publication was protected by qualified privilege. Likewise, Mr Roberts had not defamed Mr Bass by publishing the Orange Pamphlet or the Nauru Postcard. The question of the forged Free Travel Times Pamphlet was returned to the court below, though the majority of the High Court were of the opinion that in such circumstances qualified privilege would not apply.

The judgment represents a very liberal approach to the role of freedom of communication in protecting statements made during election campaigns. However, as Callinan J suggests, such liberalism may not be beneficial. There is a delicate balance between upholding freedom of political communication, and ensuring the integrity of election campaigns. Weighing the scales of justice too heavily in favour of freedom of communication risks undermining the system of government which that freedom is intended to protect.