Neutral Citation Number: [2010] EWCA Civ 1171

Case No: A2/2009/1602

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE TUGENDHAT
HQ06X03643

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st December 2010

Before :

LORD JUSTICE WARD
LORD JUSTICE THOMAS
and
LORD JUSTICE RICHARDS

- -

Between :

Jane Clift — Respondent

- and -

Slough Borough Council — Appellant

- -
- -

Edward Faulks QC and Andrew Spencer (instructed by Barlow Lyde & Gilbert LLP) for the appellants
Hugh Tomlinson QC and Christina Michalos (instructed by Simons Muirhead & Burton) for the respondent
Hearing date: 24th June 2010

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Approved Judgment

Lord Justice Ward:

The issue

1. The interesting issue in this appeal is how if at all the Human Rights Act 1998 has affected a local authority's defence of qualified privilege in defamation cases.

The facts

2. Jane Clift brought a libel claim against the Slough Borough Council and Mr Patrick Kelleher, the Council's Head of Public Protection, arising out of the publication of the Council's Violent Persons Register which named Ms Clift as a person who posed a medium risk of violence following an incident described as "Threatening behaviour on several occasions". Ms Clift's name came to be placed on the Register in these unfortunate circumstances. On 10th August 2005 she was in a small public garden managed by the Council when she saw a three or four year old child trampling through a flower bed, uprooting plants and plucking off the heads of flowers. She protested to the child's mother whereupon the mother's companion who had been drinking became extremely abusive and threatening. He stated that if she did not like what the boy had done he would smash the whole lot and then started trampling the plants himself. It was an upsetting and frightening incident.

3. As a result of her having called for a park warden to attend, Ms Clift was told that she should contact Ms Fozia Rashid, the respondent's Anti-Social Behaviour Co-ordinator to find out what action would be taken against the couple whose identity had been established by the police when they eventually attended the scene. The respondent spoke to Ms Rashid on the telephone the next day. The conversation went horribly badly. The detail does not much matter. As described in her witness statement, Ms Clift became angry because "After acting as a concerned citizen she was treating me as if I was the person who had done something wrong". The acrimonious conversation ended abruptly.

4. Ms Clift was outraged by the response she had received. She immediately spoke to an administrator in the office of the Chief Executive who told her to take it up with Ms Rashid herself which elicited the sharp retort that she had no wish to speak to her again and "Right now, I wish she'd drop dead." The following day the respondent wrote a three page account of these events, the penultimate paragraph reading:

> "I did not want to give Fozia Rashid the self-satisfaction of terminating the call – I slammed my phone down so hard I broke it. I felt so affronted and so filled with anger that I am certain I would have physically attacked her if she had been anywhere near me. I truly am not of that nature and so, surely, this should act as a wake up call to the Borough as to the capacity she has for offending people. Persons appointed to posts in the fields of public protection and community safety should excel in their interpersonal and communication skills. Those qualities were obviously not the determining factor in this appointment and, quite frankly, I feel she is a liability.

> How can Slough Borough Council sustain this position? They have a duty of care and should seek to take action out of respect for the council tax payer who pays to maintain these amenities, respect for park wardens who work so hard in them, and for people like myself who make the effort. Instead, Fozia Rashid only sought to ridicule and vilify me."

5. Her letter was passed to Mr Kelleher for investigation. On 25th October 2005 she attended a meeting with him as part of the Council's formal complaints procedure. He accurately recorded:

> "Jane wants every avenue explored and feels that Fozia has no knowledge of legal options open to L.A. Stunned that Fozia is in the post. Stated she would have hit Fozia if she could. Wants her out of the post."

6. Having concluded his investigations and interviewed various witnesses, Mr Kelleher wrote to Ms Clift on 30th November 2005:

> "During the course of my investigation I have interviewed key witnesses and examined file notes. As the investigation has unfolded, however, I have become increasingly concerned by your violent and threatening behaviour towards Ms Rashid
>
> - on 10th August 2005 you slammed the phone down on Ms Rashid
> - in your subsequent letter dated 12th August 2005 you stated "I am certain that I would have physically attacked her (Ms Rashid) if she had been anywhere near me"
> - during our meeting on 25th October 2005 you again stated that you would physically attack Ms Rashid if you could and repeatedly demanded that the local authority sack her
> - during a telephone call to our Corporate Team on 12th August you are reported to have said that you wished Fozia would drop down dead.
>
> Slough Borough Council does not tolerate aggressive, threatening and violent behaviour of this nature directed towards its staff. The above incidents represent unacceptable behaviour in line with the Directorate's Violence at Work policy (H&NS/COP/1.12) and the Data Protection Act 1998, I am writing to inform you that because your behaviour towards Ms Rashid, a warning marker will be placed against your name for a period of 18 months.

> This timescale will be increased by three times if you commit a further offence during this period.
>
> This warning marker will also be shared with other Council departments and Government agencies within the Borough, by electronic or manual means. The Local Authority will continue to provide you with your normal range of services, but you can anticipate that suitable arrangements will be put in place to ensure the safety and well being of our staff."

7. So her name was entered on the Violent Persons Register maintained by Mr Peter Satterthwaite, the Council's Policy and Performance Adviser responsible for compliance with Data Protection and for the Council's policy concerning violence at work, part of the Safe System at Work Codes of Practice. He decided her name was to remain on the Register for 18 months. On 1st December 2005 Mr Kelleher sent an email to 54 individuals who were officers or employees of the Council, the subject matter of the email being "Violent Persons Register – Ms Jane Clift", the email stating:

> "I have requested that Jane Clift's name be added to the register of violent persons following repeated threats of violence towards a member of staff.
>
> Whilst we will continue to provide her with our normal range of services, I would ask that any officer making a site visit, or conducting a face-to-face interview with Ms Clift, does so in the presence of an accompanying officer. Equally, any member of staff receiving a phone call from Ms Clift should make a full file note of that conversation, including Ms Clift's manner."

A copy of the Register was circulated with the email. He also asked that hard copies of the email be sent to 12 Community Wardens. This email published to these 66 people is the first libel of which Ms Clift complains.

8. The Register, which described the "incident" as "Threatening behaviour on several occasions" and which Ms Clift alleged was itself defamatory of her, was also sent to a number of "Partner Organisations that provide a service on [the Council's] behalf" namely:

(1) Slough Accord, concerned with environmental management including refuse collection and road sweeping;

(2) Interserve FM, concerned with building maintenance on Council-owned properties and estate maintenance even though Ms Clift does not own or live in Council property;

(3) NHS Primary Care Trust, with Social Services related activities including the Community Mental Health Team, Supporting People and Community Nursing; and

(4) Community Safety Partnership, including about 50 businesses in the Town Centre Business Initiative.

Evidence was given at the trial that the Register would have been circulated to not more than 150 people.

The trial

9. In their defence to the claimant's claim that the email and Register were defamatory of her, the defendants pleaded justification and that the words complained of were published on an occasion of qualified privilege alleging that:

> "The email [and a similar plea was made in relation to the Register] was published on an occasion of qualified privilege in that the second defendant had a duty to send the email namely to protect the safety of the first defendant's staff and the staff of its Partnership Organisations, which staff had a corresponding interest in receiving the same."

10. Mr Hugh Tomlinson Q.C. was instructed to lead Ms Christina Michalos very shortly before the trial began and he applied to re-amend the reply in order to deny that the email and the Register entry were published on occasions of qualified privilege, contending that as the Council is a public authority within the meaning of section 6 of the Human Rights Act 1998, it is bound to act in a way compatible with Ms Clift's rights under the European Convention on Human Rights; that it was accordingly unlawful for the first defendant to publish information relating to her unless that publication was in accordance with law and was necessary in a democratic society for a legitimate aim such as the protection of the rights of others. It was alleged that the publication was not necessary nor proportionate and that accordingly neither the email nor the Register were published on occasions of qualified privilege. No objection was taken to this late amendment. The reply also alleged malice on the part of Mr Kelleher.

11. At the close of the defendant's case, and after hearing legal argument, Tugendhat J. made three rulings: first that there was a case on justification to go to the jury; and second that there was a case on malice to go to the jury. The third ruling related to the defence of qualified privilege at common law and the judge decided that for both the email and the Register:

> "38. 1. [The defendants] have a qualified privilege defence in relation to publication to employees of the Council who were 'customer facing staff' (and their managers) being employees in the following departments: Trading Standards, Neighbourhood Enforcement and Community Safety.
>
> 2. [The defendants] do not have a qualified privilege defence in relation to publication to employees of the Council who were 'customer facing staff' nor their managers, being employees in the following departments: Licence, Food and Safety, Children and Education Services.

> 3. [The defendants] do not have a qualified privilege defence in relation to community wardens, trade union officials, anyone in the four partner organisations."

12. He explained that publication to those in paragraph 1 of his ruling was rational and proportionate but publications to other employees were not proportionate or fair. He did not accept that it was reasonable to conclude that any risk existed to those of the Council's staff who worked in departments which Ms Clift was not likely to approach, such as Licensing. Trade union officials did not need to see the names of those on the Register in order to verify that the council was taking appropriate measures to protect union members. Anonymising the version of the Register sent to them would be a simple and proportionate measure. In his judgment the Council owed no duty to the staff of Partner Organisations which it did not owe to the staff of any other body, public or private, from which Ms Clift might seek services or supplies. As Mr Satterthwaite had correctly conceded, there was no evidence of risk and administrative convenience could not be a sufficient reason for sending the Register to such organisations.

13. The effect of these rulings was that the jury were directed that if they did not find that the words complained of were published maliciously, damages were to be assessed on the basis that the Register was circulated to 150 people and the email to 30 people (the publication to the remainder of the 66 persons being covered by qualified privilege). The jury rejected the defence of justification but also found that Ms Clift had not established malice against Mr Kelleher. In relation to the publications which the judge had ruled were not covered by qualified privilege, the jury awarded Ms Clift damages of £12,000.

14. The judge refused to grant permission to appeal his rulings on qualified privilege and the Council applied to this Court, the application being adjourned into court. Having heard full argument, I would grant permission to appeal.

Discussion

15. Mr Edward Faulks QC, as he was when he appeared before us on the appellant's behalf and who deserves our congratulations on the barony since then conferred upon him, challenges the judge's rulings that the Council does not have a qualified privilege defence (1) in relation to publication to their employees in Licensing, Food and Safety and Children and Education Services who, although they were "customer facing staff", were not likely to be approached by the claimant and (2) also in relation to Community Wardens, Trade Union Officials and anyone in the four Partner Organisations. The appeal is thus solely concerned with those who fall within groups 2 and 3 referred to in paragraph 38 of the judgment cited at [11] above. For convenience I shall refer to them as the "supernumerary employees" to distinguish them from the employees in group 1 whom I exclude from the discussion which follows. The distinction is that the judge found that publication to the supernumerary groups was disproportionate whereas publication to those in group 1, being proportionate, did not breach Article 8.

16. The argument advanced for the appellant is simple and not unattractive. Mr Faulks submits that there can be no question but that the Council was plainly in "an existing relationship" with their own employees and just as clearly with employees of the first partnership organisation. Given that relationship, the court is bound by *Kearns v General Council of the Bar* [2003] 1 W.L.R. 1357, a decision of this Court, to find that the occasion of the communications between the Council and every one of those recipients of the email and Register was protected by qualified privilege. Moreover, he submits, Tugendhat J. had himself recognised and acknowledged that in *W v Westminster City Council* [2005] EWHC 105 (QB).

17. In *Kearns* the claimants sought to recover against the General Council of the Bar damages for libel in respect of a communication from Mr Mark Stobbs, the head of the Bar Council's Professional Standards and Legal Services Department to all heads of chambers, their senior clerks and practice managers to the effect that the claimants were not solicitors and were thus not entitled to instruct counsel with the result that it would be improper for members of the Bar to accept work from them. The communication was undoubtedly libellous and untrue. Moreover it was not suggested that publication was malicious. Eady J. entered summary judgment for the defendants. In his judgment, which was approved by Simon Brown L.J.,

> "… it has long been the policy of the law to protect persons in certain kinds of relationship with one another, and indeed to encourage in such cases free and frank communications in what is perceived to be the general interest of society. In those cases, one does not need to assess the interest of society afresh in each case. We all need to know where we stand. In this area the law was thought to be settled, on the basis that the balance would fairly be struck if liability in such situations was confined to those cases where the occasion of communication was abused - in the sense that malice could be established. Nothing short of malice would undermine the law's protection."

Simon Brown L.J. added this:

> "39. … It matters not at all whether Mr Stobbs and the Bar Council are properly to be regarded as owing a duty to the Bar to rule on questions of professional conduct such as arose here, or as sharing with the Bar a common interest in maintaining professional standards. What matters is that the relationship between them is an established one which plainly requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Bar Council's functions."

18. In *W v Westminster City Council* the claimant complained of a reference in a Report for the Review Child Protection Case Conference to be held pursuant to the duties imposed on local authorities by the Children Act that there was "concern that [the claimant] might be grooming S for prostitution." The two individual employees of the defendant Council responsible for the publication admitted that it should not have

happened and that the explanation was one of mistake and a misunderstanding on their part. In that sense it was not suggested that there was any duty to publish. Tugendhat J. held that:

> "149. This is a case of an existing and established relationship, going back many years, between the mother's family and the Social Services Department of the Council. Accordingly, *Kearns* supports the following conclusion. The fact that the information in the words complained of was not verified (or not 'evidence based') could not take the case outside the protection of qualified privilege unless [the authors of the report] were deliberately publishing what they knew to be outside the official guidance known to them.
>
> 150. It is true that the duties of the Council in this case (which were being performed on their behalf by [the authors]) were public law duties imposed upon them by the Children Act. If the words complained of are published to [a] person to whom there is no duty to publish, or at a time, or in other circumstances when there is no duty to publish, the consequences of that do call for consideration.
>
> 151. However, in my judgment what matters is that the relationship between the Defendants and the publishees was an established one which plainly requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Council's functions."

19. Mr Hugh Tomlinson Q.C. meets that argument in this way. He submits:

> (1) An occasion of publication will be privileged if the publisher can establish a legal, moral or social duty to publish the communication to publishees who have a corresponding interest or duty to receive it. Reciprocity is essential (*Adam v Ward* [1917] A.C. 309, 334).
>
> (2) A public authority should only be entitled to rely on the defence of qualified privilege in respect of a defamatory publication if the publication was consistent with its public law duties.
>
> (3) A public authority should only publish information for the purpose of and to the extent necessary for performance of its public duty and in accordance with its obligations under the Human Rights Act 1998.
>
> (4) If the information published is damaging to an individual's reputation, that person's Article 8 rights are engaged so that the Council come under a duty not to interfere with her rights

> under Article 8(1) unless the publication can be justified under Article 8(2).
>
> (5) In order to be justified under Article 8(2) the publication must be necessary for a legitimate aim and must be proportionate to that aim. In other words, applying *Huang v Home Secretary* [2007] 2 A.C. 167, paragraph 19
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> (i) the legitimate aim in question must be sufficiently important to justify the interference;
>
> (ii) the measures taken to achieve the legitimate aim must be rationally connected to it;
>
> (iii) the means used to impair the right must be no more than is necessary to accomplish the objective; and
>
> (iv) a fair balance must be struck between the rights of the individual and the interests of the community which requires a careful assessment of the severity and consequences of the interference.
>
> (6) This approach is consistent with the duties imposed on public authorities by the Data Protection Act 1998.
>
> (7) On the facts of this case, the judge was correct to hold that publication was excessive and not proportionate.

20. Mr Tomlinson draws attention to and relies upon *Wood v Chief Constable of the West Midlands Police* [2005] E.M.L.R. 20 where the performance of a public duty was held to be relevant to the question whether or not the defendant had a sufficient duty or interest to publish the defamatory material. In that case a Detective Chief Inspector with responsibility for crime prevention was investigating a series of car thefts and arrested the claimant's business partner and, before the accused had even stood his trial, informed members of the insurance industry, such as the manager of the Association of British Insurers Crime and Fraud Prevention Bureau, that he was guilty. In fact he was subsequently acquitted. The claimant complained that the letters associating him and the business with the accused meant and were understood to mean that he had aided and abetted the commission of numerous serious criminal offences. The chief constable raised a defence of qualified privilege which Tugendhat J. struck out as having no real prospect of success because in his judgment there was no lawful justification, still less any duty, on the chief constable to disclose the information that he did in so far as it concerned the claimant. The chief constable appealed.

21. May L.J. began his judgment with a references to *Kearns* noting that Simon Brown L.J. had cited "certain of the classic statements of the law relating to qualified privilege to be found in the authorities" including those from *Toogood v Spyring* (1834) 1 C.M. and R. 181 and *Adam v Ward* which I quote in paragraph [25] below. There is no suggestion in May L.J.'s judgment that an existing relationship had

replaced the duty/interest test. Instead the argument centred on the relevance of *R. v Chief Constable of North Wales Police*, *ex p. Thorpe* [1999] Q.B. 396 to the discussion of the Chief Constable's duty. In *Thorpe* the police had informed the owner of a caravan site where the claimants lived that they were convicted paedophiles. On an application for judicial review, the policy of the Chief Constable as to disclosure of sensitive and damaging information was called into question. Lord Bingham of Cornhill C.J. observed at p. 409 that:

> "When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty. … The principle, as I think, rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce."

22. In *Wood* May L.J. identified the relevant question to be whether the Chief Constable, acting through his subordinate, had a sufficient duty or interest to publish the defamatory letters. He stated that it did not help in a search for that duty or interest to characterise the defence of qualified privilege as a private law defence. The extent and limits of the public duty of disclosure in the circumstances of the *Thorpe* case illuminated, without necessarily defining, the extent and limits of their duty of disclosure in other circumstances. He was satisfied that the police had no business, let alone duty, to make the statements of which complaint was made and he held:

> "In so far as the requisite duty needed also to measure up to human rights considerations, [the Chief Constable's] publications, defamatory of [the claimants], were not in the circumstances proportionate to the legitimate aim [the Chief Constable] was pursuing. But I think that that is really saying the same thing in a different language."

But May L.J. did make it clear that he did not consider that any decision in that case should be seen as having implications of principle beyond its particular facts.

> "This is not least because the Human Rights Act 1998, the Data Protection Act 1998 and s. 115 of the Police Act 1997 have all come into force since the disclosures in the present case."

23. Given the decisions in *Kearns* and *Wood* this appeal may be thought to present a conundrum: is proof of an established, existing relationship of itself sufficient (unless actuated by malice) to justify a free flow of information between the parties to the relationship (per *Kearns*) or does the absence of a duty to communicate rob the defendant of his defence of qualified privilege (per *Wood*)?

24. To answer that puzzling question one must begin with the reason for the defence. It is rooted in public policy. "The most valuable judgment of Willes J." in *Henwood v Harrison* (1872) L.R. 7 C.P. 606, 662, cited with approval by Lord Shaw of Dunfermline in *Adams v Ward* at page 349, gathered the earlier decisions together, including, especially, *Toogood v Spyring* and summed them up in these terms:

> "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

In similar vein, Bankes L.J. held in *Gerhold v Baker* [1918] W.N. 368, 369:

> "It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest."

We are beginning to see how notions of duty and interest spring from the application of this policy.

25. This has led to the well-established dual classification that qualified privilege depends upon showing either a duty situation or an interest situation, the former where the maker of the communication was under some legal or social or moral duty to speak out and the recipient had an interest in receiving the information or in the latter case where the maker of the statement was acting in furtherance of some interest or his which the recipient has a reciprocal interest in receiving or was acting under a common interest in the subject matter shared with the recipient. As *Gatley on Libel and Slander*, 11th ed. says at 14.6, "two formulations have become almost canonical in this area." The first is in *Toogood v Spyring* where Parke B. stated the law in the following terms:

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or

> exigency, and honestly made, such communications are protected for the common convenience and welfare of society."

The second passage is taken from the speech of Lord Atkinson in *Adam v Ward* at p. 334:

> "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. This reciprocity is essential."

26. These and passages to like effect were cited by Simon Brown L.J. in *Kearns* and I do not for a moment contemplate that he was ignoring them or disapplying them or making new law inconsistent with them. The issue in that case was defined at the outset of his judgment:

> "1. When is verification a relevant circumstance in determining whether or not a defamatory communication is protected by qualified privilege? That, in the last analysis, is the question raised by this appeal."

That issue seems to have arisen in part because of an argument that the publication to ten thousand members of the Bar warranted treating the case as being "half-way", as Keene L.J. described it, towards the situation with which the House of Lords was dealing in *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127, a media publication in respect of which steps taken to verify the information may be crucial to deciding whether or not qualified privilege attaches.

27. In *Kearns* the defendant, who was seeking summary judgment, contended that because there was a common and corresponding interest between the Bar Council and the recipients of the letter from Mr Stobbs and because the subject matter of the letter was relevant to the established relationship which existed between the Bar Council and its members, those facts of themselves gave rise to the protection of the privilege. Based on the "classic statements of law" to be found in the authorities, the defendant submitted that common interest cases and duty-interest cases were quite distinct, communications in the former category attracting privilege on a wide and generous basis, communications in the latter category having to be much more closely scrutinised on the facts. Whereas attempts at verification and the like might well be relevant to the latter category of case, they would not on the claimant's arguments be relevant to the former unless and until the issue of malice was raised. The claimant submitted on the contrary that there was no distinction between those various cases: one category shaded into another and the question whether qualified privilege attached to any particular occasion or communication had always to depend on the facts. Summary judgment could be resisted if those facts fell for decision at the trial. The claimant's arguments did not appeal to Simon Brown L.J.. He decided:

> "The argument, as it seems to me, has been much bedevilled by the use of the terms "common interest" and "duty-interest", for

> all the world as if these are clear-cut categories and any particular case is instantly recognisable as falling within one or other of them. … To my mind an altogether more helpful categorisation is to be found by distinguishing between, on the one hand, cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and, on the other hand, cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship)."

28. This, in his judgment, avoided the difficulties facing the court when dealing with communications made between strangers, for example as in *Stuart v Bell* [1891] 2 Q.B. 341 where Scrutton L.J. held that whether or not the maker of the defamatory communication was under a legal or moral duty to communicate depended on the circumstances of each case, the nature of the information, and the relation of the speaker and the recipient. As Simon Brown L.J. observed:

> "32. One searches the authorities in vain for comparable statements in the context of communications made between those in an established relationship which, by its very nature, involves reciprocal interests and/or duties."

So in his judgment:

> "34. … Where the communication is made within an established relationship and is relevant to it, the necessary conditions *are* satisfied.", his emphasis being added.

29. Keene L.J.'s judgment is revealing. He said:

> "45. I agree. The question of whether the existing relationship in any particular case gives rise to a common interest or to a duty/interest situation will often produce a somewhat sterile dispute, and certainly in the present appeal it is not the crucial issue. Whichever of those two categories is said to apply, the fact remains that each of them normally presupposes an existing relationship between the person who made the statement sued on and the recipient of it. In such a case, so long as the statement is fairly warranted by the occasion, and is made in the absence of malice, it will be protected by qualified privilege, irrespective of the degree of investigation or verification carried out by the maker of the statement and irrespective of whether one categorises the situation as one of common interest or of duty and corresponding interest."

30. In the result the defendant's attempt to defeat the claim for summary judgment by submitting that all the circumstances of the case required investigation at trial was rejected.

31. Eady J. has expressed this view of *Kearns* in his judgment in *Howe & Co v Burden* [2004] EWHC 196 (QB):

> "15. … *Sometimes* it is possible from the surrounding circumstances to come to a definitive conclusion without the need to resolve factual disputes: see e.g. *Kearns* ... That was a case of what one might call "off the peg" privilege, where the issue can be resolved simply by looking at the relationship between the parties and the subject-matter of the relevant communication," the emphasis being added by me.

I agree. In particular I agree that it is "sometimes" only that it is possible to look to the special relationship and no more, and, to coin his graphic phrase, to buy "off the peg", noting as one does so, the absence of any sign above the clothes' rail that "One size fits all". It does not. It is necessary to recall how in *Gerhold v Baker* (see [24] above) Bankes L.J. defined the public interest which underpins the defence as being the need to be "allowed to speak freely on occasions when it is their duty to speak". The private interest in one's reputation is to be preferred to the public convenience of unfettered communication where there is no duty to communicate at all. That was the case in *Wood* as a matter of public law. *Wood* is binding on us. Moreover it is rooted in established authority and is, if I may respectfully say so, clearly right. It is to be preferred to *Kearns* as the proper approach in this appeal because the defendant Bar Council was not a public authority and, as a result, no question arose as to the application of the fundamental rules of good public administration. The issues that arise in this case and in *Wood* arise precisely because the defendants are both public authorities with public duties to perform which was not the case in *Kearns*. It may well be that this public law duty not to disclose the information as widely as was done here is enough of itself to preclude the qualified privilege defence but I need not express a concluded view about that because we are being asked to rule upon the effect of the European Convention of Human Rights on this defence.

32. The case before us differs from *Wood* in that the Convention is now embodied in domestic law and must be applied by us. It was not in play in *Wood* as May L.J. was at pains to point out. Here Slough Borough Council, unlike the Bar Council in *Kearns*, is a public authority bound, as is the Court, to act in a way compatible with a convention right for it is unlawful not to do so. Mr Faulks concedes (and is absolutely right to abandon a ground of appeal formulated by his predecessor) that the right to protection of reputation is a right which, as an element of private life, falls within the scope of Article 8: see *In re Guardian News and Media Ltd* [2010] UKSC 1 [2010] 2 W.L.R. 325 at [37]-[42]. If Article 8 is engaged, the Council must respect Ms Clift's right to respect for her private life unless the interference can be justified under Article 8(2).

33. Mr Tomlinson accepts that the protection of the safety of all Council employees and even the employees of the Partner Organisations is a "legitimate aim" sufficiently

important to justify an interference with Ms Clift's Article 8 rights and that the inclusion of her name on the Register is rationally connected to that legitimate aim. The important question for us, however, is whether or not a publication of the words to the supernumerary employees was proportionate. The judge's finding was that publication to those who were not likely to be directly approached by Ms Clift was disproportionate essentially because they were not at risk of harm from her. The grounds of appeal challenged that finding but Mr Faulks, rightly in my view, did not spend time in oral argument suggesting that the judge was not entitled to come to that conclusion. Instead he concentrated his attack on proportionality by submitting that the judge erred in his balancing exercise by failing to have any or any sufficient regard to the difficulties which confront local authority officials in knowing to whom information can, and to whom it cannot, be published. Mr Faulks relied particularly on the evidence given under cross-examination by Mr Satterthwaite who was responsible for the compilation of the Register and its dissemination:

> "Q. You had no need whatever to share that information?
>
> A. I am going to be honest and I think this is something for you guys to sort out about the legal aspects of it."

This demonstrates, submits Mr Faulks, the impracticability of having to make an individual assessment of the propriety of each and every publication. Life would be made impossible for the Council. Imposing such a duty would render the Council disproportionately vulnerable.

34. Mr Tomlinson submits that a more onerous obligation is not thrust on the local authority by operation of the Human Rights Act because they must do what they have to do anyway in performance of their public law responsibilities. As May L.J. put it in *Wood*:

> "58. … the police, as a public body, ought not generally to disclose information which comes into their possession relating to a member of the public, being information not generally available and potentially damaging to that member of the public, except for the purpose of and to the extent necessary for the performance of their public duty. The principle rests on a fundamental rule of good public administration which the law must recognise. …
>
> 63. … Disclosure of damaging information about individuals requires specific public interest justification. Ill-considered and indiscriminate disclosure is scarcely likely to measure up to this standard."

35. In my judgment it cannot be held to be disproportionate for a local authority to do what it is bound to do anyway whether in performance of its public law responsibilities, or its duty under the Data Protection Act 1997 or the Information Commissioner's Data Protection Act 1998 Compliance Advice used in the public sector, each of which is to all intents and purposes to the same effect. Ill-considered

and indiscriminate disclosure is bound to be disproportionate and no plea of administrative difficulty in verifying the information and limiting publication to those who truly have the need to know or those reasonably thought to be at risk can outweigh the substantial interference with the right to protect reputations. In my judgment the judge's ruling on proportionality is beyond challenge. To publish as widely as the Council did was to breach Ms Clift's Article 8 rights.

36. This conclusion presents a huge obstacle for Mr Faulks. If the Council were in breach of Article 8, it would be unlawful to publish the information. If it was unlawful to publish, then the Council's duty was not to publish. If the duty was not to publish, the Council could no longer claim to be under a duty to impart the information to those who did not need to know it. Not being under a duty to publish, the foundation of the claim to qualified privilege falls away.

37. He has three other lines of argument to rescue his case. First, he submits that the judge failed to take into account the Article 8 rights of the employees at risk. He acknowledged that to suggest that their Article 2 rights might be engaged was "putting it high". The argument fails because any risk to others was not significant enough to engage their Article 8 right to their physical and psychological integrity. Moreover counsel for the defendants did not run this argument in the court below and Tugendhat J. correctly recorded, "Nor could he sensibly have done so." This argument cannot succeed.

38. The second argument, which is also new, is to this effect: just as the Convention cannot be invoked to develop a new cause of action, so too is it impermissible to deploy Convention rights to create a new defence. The argument is based on *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 A.C. 225 where, in the conjoined case of *Smith v Chief Constable of Sussex Police* the claimant brought a common law action for damages for negligence in respect of the police officer's failure to protect him from an attack on him by his former partner of which the police had ample warning. At common law the action was bound to fail but there was some debate as to whether the policy of the common law should be reconsidered in the light of the Strasbourg jurisprudence and whether as Pill L.J. put it in the Court of Appeal "There is a strong case for developing the common law action for negligence in the light of Convention rights" or as Rimer L.J. said, "Where a common law duty covers the same ground as a Convention right, it should, so far as practicable develop in harmony with it." Those views were rejected by the House of Lords. Lord Hope of Craighead said:

> "82. In my opinion the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy."

Lord Brown of Eaton-under-Heywood was of the opinion that:

> "136. … To the extent that articles 2 and 3 of the Convention and sections 7 and 8 of the Human Rights Act already provide for claims to be brought in these cases, it is quite simply

> unnecessary now to develop the common law to provide a parallel cause of action."

He went on to point out that Convention claims have very different objectives from civil claims with different time limits and the provision that no damages are to be awarded unless necessary for just satisfaction.

39. In my judgment the fallacy in this argument is that no new defence is being created in this case. The defence is the common law defence of qualified privilege. To support the defence the defendant must first establish that it is under a duty to communicate the information to those who have a corresponding interest or duty to receive it. The issue is whether or not the Council are under such a duty. Whilst they may, on the one had, be entitled to say they are under a duty of care to their employees to alert them to risks, they are equally under a duty imposed upon them, it is true, by the Human Rights Act to respect Ms Clift's Article 8 right to her reputation and thus under a duty to her not to publish the offending material. The Court is equally under a duty to ensure that Convention rights are respected. It follows that the duty to Ms Clift not to publish trumps the duty to the supernumerary employees to distribute the entry on the Violent Persons Register. In those circumstances the Council cannot maintain its defence of qualified privilege.

40. Finally, the third argument was "Departing from *Horrocks v Lowe"* [1975] A.C. 135. This relates to some views the judge expressed on the "Implications of this judgment". He said:

> "The effect of my decision has been to 'involve application by the court of an objective test of relevance to every part of the defamatory matter published'. That is what Mr Tomlinson's submission pursuant to *Huang* required: see para [70] above. And this also is what Lord Diplock accepted was logical. But at least in some cases, as Lord Diplock observed, that may make the 'protection afford by the privilege … illusory'. When reaching my decision I had in mind that it represents a departure from *Horrocks v Lowe.* I considered that this departure was justified and required by HRA. The words complained of in *Horrocks v Lowe* were a slander spoken at the meeting of a Town Council. They related to the plaintiff's conduct in business and local politics. But the words of Lord Diplock have always been taken as applying to all cases of common law qualified privilege."

41. The only issue in *Horrocks v Lowe* was whether or not the defendant had misused the privileged occasion (and it was never disputed that the occasion was privileged) by using it for some purpose other than that for which the privilege was accorded to it in the public interest. His positive belief in the truth of what he said entitled him to succeed in his defence of qualified privilege.

42. Lord Diplock gave a typically illuminating explanation of the law relating to qualified privilege and malice at p. 149:

> "My Lords, as a general rule English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction: if he cannot prove that defamatory matter which he published was true, he is liable in damages to whomever he has defamed, except where the publication is oral only, causes no damage and falls outside the categories of slander actionable per se. The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege."

Pausing here for a moment and applying the penultimate sentence in that passage, any public or private duty, legal or moral, to warn the supernumerary employees of the risks posed by Ms Clift did not justify the Council's communicating it because any such duty to those employees was outweighed by their duty to Ms Clift not to communicate information damaging her reputation.

43. The passage to which Tugendhat J. was referring was the passage at p. 151:

> "There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true. But where, as in the instant case, conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed and judges should remind

> themselves that this burden of affirmative proof is not one that is lightly satisfied.
>
> The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in *Adam v Ward* [1917] A.C. 309, 326-327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference."

44. I confess I do not understand why the judge considered that an examination of proportionality involved any "application by the court of an objective test of relevance to every part of the defamatory matter published". The proportionality issue may have involved "an objective test of relevance" (or I would say "necessity or reasonableness") of the publication to various categories of recipients, but that is not questioning the relevance of "every part of the defamatory matter" itself which is that with which Lord Diplock was dealing. The relevance of the content of the e-mail and the Register was not in issue at all. It might have been different if, to use Mr Tomlinson's example, the offending communication informed the employees, "Beware of Ms Clift because she is a violent woman and what is more, she is an habitual drug-taker". The employees' interest was limited to the risk she posed to them as a violent person; her drug-taking was irrelevant. Here the content of the defamatory statement was not under scrutiny at all: the court's concern was focussed

on whether the recipients needed to know the information and whether or not it could reasonably be said that they were at risk. For my part I do not see why *Horrocks v Lowe* was relevant at all.

45. Concentrating on the recipients of the communication enables the appellant to complain of the difficulties I have already touched on for the Council's officials to be certain of where the line is to be drawn when communicating with the employees on delicate matters concerning their personal safety in the difficult context of numerous such decisions having to be made quickly and often distributed via electronic means. The result, it is submitted, is that public authorities will inevitably draw the line too restrictively, thereby destroying the very social utility that privilege is intended to protect, namely free and frank communications (in good faith) between publisher and recipient where a reciprocal interest exists between them, in the wider interests of society. In my judgment these concerns are properly addressed in the consideration of proportionality – see [34]-[36] above.

46. The alternative way the appellant puts this argument is to say that Article 8 does not require the removal of the defence of qualified privilege to libel because a claimant can bring a free-standing claim as she belatedly threatened to do. I do not accept that. Damages awarded in defamation claims are bound to exceed damages (if any are awarded at all) for a breach of a party's human rights. Since section 6 of the HRA requires the court to act compatibly with a Convention right, the court is bound to give effect to Article 8 if the point arises as it squarely does in this case. We simply cannot duck it, rule it irrelevant or ignore its implications for qualified privilege, leaving the claimant with her human rights claim only.

47. For the reasons I have given Ms Clift's Article 8 right to the protection of her reputation must be respected both by the court and by the Council; that results in the Council being under a duty not to interfere with her right and that negates any duty to publish to the supernumerary employees. If the Council is prevented by operation of the Human Rights Act from publishing, it loses the foundation for its claim to qualified privilege.

48. In the result this appeal must be dismissed.

Lord Justice Thomas:

49. I agree.

Lord Justice Richards:

50. I also agree.