Neutral Citation Number: [2004] EWHC 2866 (QB)

Case No: HQ03X03397

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 9th December 2004

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

W	**Claimant**
- and -	
(1) Westminster City Council	**Defendants**
(2) Anca Marks	
(3) James Thomas	

- -
- -

Mr. Philip Shepherd QC and **Mr. Manuel Barca** (instructed by **Kerman & Co.**) for the **Claimant**
Mr. Edward Faulks QC and **Mr. Julian Waters** (instructed by **Barlow Lyde & Gilbert**) for the **Defendants**

Hearing dates: 29TH November 2004 – 1st December
3rd December 2004

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONORABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. On Monday 29 November 2004 this libel action was listed for trial before myself and a jury. The Defendants are Westminster City Council, who I will refer to as the Council, Anca Marks, and, by amendment this week, James Thomas. The Second and Third Defendant are both social workers employed by the Council. The Second Defendant is supervised by the Third Defendant. In a judgment handed down on 3 December [2004] EWHC 2812 (QB) I set out the circumstances, in which the cases came before the court, my reasons for allowing a late amendment to the Defence, and my decision to order that the trial should proceed by judge alone.

2. Publication of the words complained of in this action is admitted. There is an issue on the meaning of the words, and there are defences of absolute and qualified privilege. A decision that there is a defence of absolute privilege would determine the case in favour of the Defendant. For this reason, and because it seemed to me that there was need for clarification of the defences of privilege in this case, I decided to hear argument on the issue of absolute privilege. This is my reserved judgment on that issue.

3. There have been two recent attempts by local authorities to establish a defence of absolute privilege in relation to communications made in the exercise of their powers under the Children Act 1989. Both failed in the Court of Appeal. So this issue might have been disposed of simply by my referring to those authorities as binding on this Court. However, they were both decided before the Human Rights Act 1998 came into force, and Mr Faulks QC for the Council had made clear that the Council wished the matter to be reconsidered in the light of recent developments of the law.

BACKGROUND

4. The background to this action is as follows. Put very briefly, this Claimant is a man, now aged 70, who is the father of a child with whom the Council's social services department have been concerned. In 1997 he and a lady I shall refer to as the Mother had a relationship, as a result of which a boy called H was born. The Mother already had another child, by a different father, a girl called S who was born in 1991. S is therefore now in her early teens.

5. The action arises out of words in a document headed "Report for Review Child Protection Case Conference on [B…/[the Claimant]] Family" and dated 31 March 2003. The words complained of are:

> 'S
>
> S is an 11 year-old young girl…
>
> Due to the fact that S never discusses her difficulties with anyone and keeps all her feelings inside she is vulnerable and at risk… This especially includes risks like drug abuse, prostitution and teenage pregnancy…
>
> Concerns increase if it's considered that there have been numerous reports of S's high level of sexual awareness…
>
> S is also extremely protective of her mother and distrusts any professional related to social services. There is no particularly strong bond between S and

> [the Claimant] and it is reported that she dislikes him making visits to her school. It has been reported to Social Services that at one stage [the Claimant] regularly took S out for dinner at very expensive restaurants, as well as buying her loads of gifts. During the Core Assessment that was done last year professionals raised the concern that [the Claimant] might be grooming S for prostitution. S has very little contact with her biological father.'

6. The Claimant pleads that these words meant or were understood to mean that there were serious ground to suspect him of being a predatory paedophile who was grooming S with a view to abusing her sexually, and for prostitution and abusing her trust in him as a father figure. Meaning is in issue, but it is not said that the words are incapable of bearing the pleaded meaning.

7. Publication is alleged to have been made to five persons who (in addition to the Claimant, and the Second and Third Defendants) attended the Child Protection Case Conference held on 1st April, the day after the report is dated. The publishees are the Council's Head of Commissioning for Child Protection, the minute taker from the Child Protection Unit, S's School nurse, the Headteacher of the school which S then attended, and the Mother. It must be recognised that publication of an allegation of a sexual nature (if that be the meaning of the words complained of) could in principle be very damaging indeed, even if made to one person, if that person may act upon the publication in a way that affects the future relationship between the Claimant and the family.

8. There is a plea of aggravation for damage arising out of particulars said to demonstrate the dilatory and inconsistent response of the Council to the Claimant's complaint. Those particulars include at para 8.8 that in a letter of 15 August 2003 the Council:

> "(1) admitted that there was 'no evidence' to support any ostensible concern that the Claimant 'might be grooming S for sexual abuse';
>
> (2) conceded that 'no reference to this issue should have been included' in the Report.
>
> Yet despite these admissions, Mr Thomas conspicuously failed to provide any explanation of why Ms Marks had nonetheless seen fit to include the defamatory allegations complained of in the Report. The Claimant has yet to receive any such explanation from Westminster or Ms Marks herself".

9. The Claim is thus not directed to obtaining a retraction by the Council. The Claimant already has that. His objective is to establish how the words complained of came to be included in the Report. In the Amended Defence para 8.8 "it is admitted that the administrative handling of the Claimant's complaint has fallen short of the ideal".

10. In the form in which the Re-Amended has been served this week, with my permission, the defence is now pleaded as follows:

> "3a The words complained of were written on an occasion of absolute privilege
> PARTICULARS

> The words were published in a report by Miss Marks and Mr Thomas, who were social workers employed by the First Defendant with responsibility for the B family, for the purposes of a Child Protection Case Conference in relation to S".

THE STATUTORY FRAMEWORK

11. In order to understand this it is necessary to set out the statutory framework:

i) The Children Act 1989 provides:

> "17 Provision of services for children in need, their families and others
>
> (1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs. ….
>
> (10) … a child shall be taken to be in need if—
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; ...
>
> and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.
>
> 47 Local authority's duty to investigate
>
> (1) Where a local authority—
>
> (a) ....
>
> (b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm,
>
> the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether

> they should take any action to safeguard or promote the child's welfare".

ii) The Local Authority Social Services Act 1970 provides:

> "7 Local authorities to exercise social services functions under guidance of Secretary of State
>
> (1) Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State. "

12. Relevant guidance issued under s.7 of the 1970 Act includes:

> "Working Together to Safeguard Children – A guide to inter-agency working to safeguard and promote the welfare of children (1999)"
>
> "Framework for the Assessment of Children in Need and their Families (2000)"

13. The statutory framework, and earlier versions of the statutory guidance were explained in *X v Bedforshire CC* [1995] 2 AC 633. At p747 it is stated that

> "'The Child Protection Conference is an essential stage in each individual case. It brings together the professionals involved in that case and the family. It decides whether a child should be put on the child protection register and makes recommendations for action."

14. Mr Faulks relied on passages from the speech of Lord Browne-Wilkinson, in which he gives reasons why there should be no liability in negligence, as also providing reasons why there should be absolute privilege in defamation. The passages at p750-751 are as follows:

> "First, in my judgment a common law duty of care would cut across the whole statutory system set up for the protection of children at risk. As a result of the ministerial directions contained in "Working Together" the protection of such children is not the exclusive territory of the local authority's social services. The system is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. At all stages the system involves joint discussions, joint recommendations and joint decisions. The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Register. This procedure by way of joint action takes place, not merely because it is good practice, but because it is required by guidance having statutory force binding on the local authority. The guidance is extremely detailed and extensive: the current edition of "Working Together" runs to 126 pages. To introduce into such a system a common law duty

of care enforceable against only one of the participant bodies would be manifestly unfair. To impose such liability on all the participant bodies would lead to almost impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent.

Second, the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment: see, for example, section 17 of the Act of 1989. In one of the child abuse cases, the local authority is blamed for removing the child precipitately: in the other, for failing to remove the children from their mother. As the Report of the Inquiry into Child Abuse in Cleveland 1987 (Cm. 412) said, at p. 244:

"It is a delicate and difficult line to tread between taking action too soon and not taking it soon enough. Social services whilst putting the needs of the child first must respect the rights of the parents; they also must work if possible with the parents for the benefit of the children. These parents themselves are often in need of help. Inevitably a degree of conflict develops between those objectives."

Next, if a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties. For example, as the Cleveland Report makes clear, on occasions the speedy decision to remove the child is sometimes vital. If the authority is to be made liable in damages for a negligent decision to remove a child (such negligence lying in the failure properly first to investigate the allegations) there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.

The relationship between the social worker and the child's parents is frequently one of conflict, the parent wishing to retain care of the child, the social worker having to consider whether to remove it. This is fertile ground in which to breed ill feeling and litigation, often hopeless, the cost of which both in terms of money and human resources will be diverted from the performance of the social service for which they were provided.

> The spectre of vexatious and costly litigation is often urged as a reason for not imposing a legal duty. But the circumstances surrounding cases of child abuse make the risk a very high one which cannot be ignored.
>
> If there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care. But the statutory complaints procedures contained in section 76 of the Act of 1980 and the much fuller procedures now available under the Act of 1989 provide a means to have grievances investigated, though not to recover compensation. Further, it was submitted (and not controverted) that the local authorities Ombudsman would have power to investigate cases such as these....
>
> In my judgment, the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoings of others."

15. Child Protection Case Conferences are explained in Working Together to Safeguard Children. That document includes the following:

> "5.6 If somebody believes that a child may be suffering, or may be at risk of suffering significant harm, then s/he should always refer his or her concerns to the local authority social services department. In addition to the social services department, the police and the NSPCC have powers to intervene in these circumstances. Sometimes concerns will arise within the social services department itself, as new information comes to light about a child and family with whom the service is already in contact. While professionals should seek, in general, to discuss any concerns with the family and, where possible, seek their agreement to making referrals to social services, **this should only be done where such discussion and agreement-seeking will not place a child at increased risk of significant harm**…
>
> 5.16 The focus of the initial assessment should be the welfare of the child. It is important to remember that even if the reason for a referral was a concern about abuse or neglect which is not subsequently substantiated, a family may still benefit from support and practical help to promote a child's health and development…..
>
> *The Initial Child Protection Conference*
> *Purpose*
> 5.53 The initial child protection conference brings together family members, the child where appropriate, and those professionals most involved with the child and family, following s.47 enquiries. Its purpose is:
> - to bring together and analyze in an inter-agency setting the information which has been obtained about the child's health, development and functioning, and the parents' or carers' capacity to ensure the child's safety and promote the child's health and development;
> - to make judgments about the likelihood of a child suffering significant harm in future; *and*

- to decide what future action is needed to safeguard the child and promote his or her welfare, how that action will be taken forward, and with what intended outcomes….

5.61 Social services should provide to the conference a written report which summarises and analyses the information obtained in the course of the initial assessment and s.47 enquiries, guided by the framework set out in the *Framework for the Assessment of Children in Need and their Families*…. Parents and children, where relevant, should be provided with a copy of this report in advance of the conference which should also be explained and discussed in advance of the conference itself,.

5.63 All those providing information should take care to distinguish between fact, observation, allegation and opinion….

The Child Protection Review Conference
Purpose
5.91 The purpose of the child protection review is to review the safety, health and development of the child against intended outcomes set out in the child protection plan; to ensure that the child continues adequately to be safeguarded; and to consider whether the child protection plan should continue in place or should be changed. The review requires as much preparation, commitment and management as the initial child protection conference. Every review should consider explicitly whether the child continues to be at risk of significant harm, and hence continues to need safeguarding through adherence to a formal child protection plan. If not, then the child's name may be removed from the child protection register….

Sharing Information
General
7.27 Research and experience have shown repeatedly that keeping children safe from harm requires professionals and others to share information: about a child's health and development and exposure to possible harm; about a parent who may need help to, or may not be able to, care for a child adequately and safely; and about those who may pose a risk of harm to a child. Often, it is only when information from a number of sources has been shared and is then put together that it becomes clear that a child is at risk of or is suffering harm.
7.28 Those providing services to adults and children will be concerned about the need to balance their duties to protect children from harm and their general duty towards their patient or service user. Some professionals and staff face the added dimension of being involved in caring for, or supporting, more than one family member – the abused child, siblings, an alleged abuser. Where there are concerns that a child is, or may be at risk of significant harm, however, the needs of that child must come first. In these circumstances, the overriding objective must be to safeguard the child. In addition, there is a need for all agencies to hold information securely.
The Legal Framework
7.29 Professionals can only work together to safeguard children if there is an exchange of relevant information between them. This has been recognised in principle by the courts (see comments by Butler Sloss LJ in *Re G (a minor)* [1996] 2 All ER 65 at 68)[6]. Any disclosure of personal information to others must always, however, have regard to both common and statute law.

…. 6. "The *Working Together* booklet does not have any legal status, but with the lesson of *Cleveland CC V F* in mind, the emphasis upon co-operation, joint investigation and full consultation at all stages of any investigation are crucial to the success of the government guidelines...The consequences of inter-agency co-operation is that there has to be free exchange of information between social workers and police officers together engaged in an investigation..."

16. Framework for the Assessment of Children in Need and their Families includes the following:

> "1.58 Practice is expected to be evidence based, by which it is meant that practitioners:
>
> - use knowledge critically from research and practice about the needs of children and families and the outcomes of services and interventions to inform their assessment and planning;
> - record and update information systematically, distinguishing sources of information, for example direct observation, other agency records or interviews with family members;
> - learn from the views of users of services i.e. children and families;
> - evaluate continuously whether the intervention is effective in responding to the needs of an individual child and family and modifying their interventions accordingly;
> - evaluate rigorously the information, processes and outcomes from the practitioner's own interventions to develop practice wisdom.
>
> 1.59 The combination of evidence based practice grounded in knowledge with finely balanced professional judgement is the foundation for effective practice with children and families…
>
> 3.11 **A core assessment** is defined as an in-depth assessment which addresses the central or most important aspects of the needs of a child and the capacity of his or her parents or caregivers to respond appropriately to these needs within the wider family and community context. While this assessment is led by social services, it will invariably involve other agencies or independent professionals, who will either provide information they hold about the child or parents, contribute specialist knowledge or advice to social services or undertake specialist assessments. Specific assessments of the child and/or family members may have already been undertaken prior to referral to the social services department. The findings from these should inform this assessment. At the conclusion of this phase of assessment, there should be an analysis of the findings which will provide an understanding of the child's circumstances and inform planning, case objectives and the nature of service provision. The timescale for completion of the core assessment is a **maximum of 35 working days**.
>
> 3.37 Gathering information requires careful planning. However difficult the circumstances, the **purpose** of assessing the particular child and the family should always be kept in mind and the impact of the process on the child and family considered. It has to be remembered that:
> - the aim is to clarify and identity the needs of the child;
> - the process of assessment should be helpful and as unintrusive to the child and family as possible;
> - families do not want to be subjected to repeated assessments by different agencies;
> - if, during the assessment, the child's safety is or becomes a concern, it must be secured before proceeding with the assessment".

ABSOLUTE PRIVILEGE

17. In *Trapp v Mackie* [1979] 1 WLR 377, 379 Lord Diplock explained the principle of absolute privilege as follows:

> "…the rule of law is one which involves the balancing of conflicting public policies, one general: that the law should provide a remedy to the citizen whose good name and reputation is traduced by malicious falsehoods uttered by another; the other particular: that witnesses before tribunals recognised by law should, in the words of the answer of the judges in *Dawkins v Lord Rokeby* ((1875) LR 7 HL 744 at 753, [1874–80] All ER Rep 994 at 995), 'give their testimony free from any fear of being harassed by an action of an allegation, *whether true or false*, that they acted from malice'"

18. That case concerned evidence given at a tribunal, but the need for communication to be made 'free from any fear of being harassed by an action of an allegation, whether true or false, that they acted from malice' applies equally to other occasions to which absolute privilege attaches.

19. There are a additional rationales, namely

    i) to prevent the use of subsequent actions to initiate collateral attacks on decisions made in the proceedings in the course of which the words complained of were published, and in which the same issues would be tried over again, and

    ii) because the trial process itself provides safeguards against such statements, including a judgment in which findings as to the truth can be made.

20. In *Roy v Prior* [1971] AC 470 at 480 Lord Wilberforce expressed both these when he said:

> "The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence."

21. Mr Faulks invites attention to the similarity between these statements of policy as to why absolute privilege should attach, to the statements of Lord Browne-Wilkinson as to why there should be no common law duty of care.

22. As set out in Gatley on Libel and Slander 10th ed para 13.1, absolute privilege attaches at common law, or by statute, to a number of different types of occasion. The best known include statements made in, or in connection with, judicial, or quasi-judicial, proceedings; fair and accurate reports of the public proceedings of the courts; and

statements made in the course of parliamentary proceedings, or in reports published by order of either House of Parliament.

23. Absolute privilege is conferred by statute upon the reports and other documents issued by a number of persons and bodies performing investigative or regulatory functions which would or might not be regarded as of a judicial nature. While there are many statutes making provision for local authorities, there is no statute which assists the Defendants in the present case. The topic is not infrequently addressed by Parliament. One of the more recent statutes is in relation to local government. The Local Government Act 2000 s.74 gives absolute privilege to the Local Commissioner in Wales in the following terms:

> "For the purposes of the law of defamation, any statement (whether written or oral) made by a Local Commissioner in Wales in connection with the exercise of his functions under this Part shall be absolutely privileged".

24. It is common ground that, nevertheless, the courts can in principle extend the common law to new circumstances, as was done in *Hassleblad(GB) v Orbison* [1985] QB 475 CA.

25. The test to be surmounted if absolute is to be found to apply at common law in a new situation is one of necessity. In *Taylor v Serious Fraud Office* [1999] 2 AC 177, the House of Lords was concerned with statements contained in unused material which had come into existence as a result of a criminal investigation and were disclosed by the SFO in accordance with the principles stated by the Court of Appeal (Criminal Division) in *Reg. v. Ward (Judith)* [1993] 1 W.L.R. 619, 679-681 and *Reg. v. Keane* [1994] 1 W.L.R. 746. It included a copy of the letter to the Attorney-General of the Isle of Man and a file note. At p214 Lord Hoffmann set out the position as follows:

> "There is no doubt that the claim for absolute immunity in respect of statements made by one investigator to another (as in the case of the letter from the S.F.O. to the Attorney-General of the Isle of Man) or by an investigator to a person helping with the inquiry (as in the statements of Ms McKenzie recorded in the file note) or to an investigator by a person helping the inquiry who is not intended to be called as a witness (as in the remarks of Mr. Rogerson included in the file note) is a novel one…
>
> In *Mann v. O'Neill*, 71 A.L.J.R. 903, 907 the judgment of Brennan C.J., Dawson, Toohey and Gaudron JJ. describes the rationale as one of necessity:
>
> > "It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.' Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings

> unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged."
>
> Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle…
>
> I therefore agree with the test proposed by Drake J. in *Evans v. London Hospital Medical College (University of London)* [1981] 1 W.L.R. 184, 192:
>
> "the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."
>
> This formulation excludes statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels - but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other."

26. That case concerned the investigation of crime or a possible crime. The Defendants submit that crime is one of the matters to which their duties under s.47 extend (although it is not suggested that s.47 became engaged in the present case). I was referred to the range of offences under the Sexual Offences Act 2003, in particular ss9 to 29, under the headings 'child sex offences', 'abuse of a position of trust', and 'familial child sex offences'. There is no doubt that s.47 does require the Defendants to make enquiries in relation to such offences. Corresponding duties may also fall upon teachers and health workers who are responsible for children. But the duties of the Defendants and others with responsibility for children cannot on that account be considered as part of the administration of justice.

27. This is not to say that their responsibilities are any less important than those whose primary function is the investigation, prevention and prosecution of crime. What it does mean is that the test of necessity would have to be satisfied in respect of statements made over the whole range of their responsibilities, including statements made to all those with whom the statutory guidance provides that information should be shared. That is a very wide class of communications and of publishees in which the test of necessity has to be satisfied.

28. The first recent attempt to establish that absolute privilege applied in relation to certain child care proceedings was made in *Waple v Surrey County Council* [1998] 1 WLR 860. The council served on the plaintiff a contribution notice pursuant to its powers under paragraph 22 of Schedule 2 to the Children Act 1989 requiring him to contribute towards the maintenance of an adoptive child, J, of the plaintiff whom the council had placed with foster parents.

29. Children Act 1989, Sch. 2, para. 22(1) provides:

> "Contributions towards a child's maintenance may only be recovered if the local authority have served a notice ('a contribution notice') on the contributor . . ."

30. This was a case in which parents strongly resented the way in which the local authority had acted in relation to proceedings involving their child. The grievance bears some comparison with that of the Claimant in this case, being an accusation relating to the parent plaintiff's conduct towards the child, albeit not relating to sexual matters. The words complained of were written in a letter from a Mr O'Brien, the council's solicitor to the plaintiff's solicitor.

31. After reviewing authorities on absolute privilege, Brooke LJ said at p867B:

> "In my judgment, it is not open to us, when taking account of this line of authority, to extend the scope of the absolute privilege granted to statements made in connection with judicial proceedings to the statement made in Mr. O'Brien's letter…. This is the kind of exchange in which solicitors acting for a public authority often involve themselves, and although in the ordinary way their letters would attract qualified privilege, I can see no warrant for extending the scope of absolute privilege to cover a communication of this type. It is not the type of communication embraced in Devlin L.J.'s third category in *Lincoln v. Daniels* [1962] 1 Q.B. 237. Nor does it have an immediate link with possible proceedings of the kind the courts were considering in *Evans v. London Hospital Medical College (University of London)* [1981] 1 W.L.R. 184. … If Parliament had wished to extend absolute privilege to communications by council officers acting in Children Act matters it would have been able to do so during the passage of that Bill. It appears to me that the balancing of the need to protect people's reputations from being harmed by malicious communications and the need to protect council officers from the worry of any form of litigation is very much a matter for Parliament and not for the courts ".

32. Mr Faulks submitted that *Waple* is to be distinguished on the basis it did not concern performance of duties under s.17. He also submitted that the case did not appear to have received submissions of the kind made to me. These points may be so, although I note that *X v Bedforshire CC* [1995] 2 AC 633 was cited in the judgement of Brooke LJ. Be that as it may, the statement of principle is such that, subject to other points, I might well have followed *Waple,* even if it had been the only authority cited. But the question does not arise.

33. The next year a second attempt was made to establish a defence of absolute privilege in relation to communications made by a local authority exercising powers under the Children Act, in this instance, as here, under s17: *S v Newham London Borough Councial* [1998] 1 FLR 1061; [1998] EMLR 583. The constitution of the Court was Lord Woolf MR, Butler-Sloss and Chadwick LJ. In the judgment of the Court it was noted at p1062H that:

> "At the heart of this issue is a conflict between the right of an individual to bring an action for damages for defamation and the public interest in protecting children from conduct which could adversely affect their well-being or put them at risk."

34. The words complained of were in a letter concerning the claimant written to the consultancy service of the Department of Health about his possible inclusion on and Index maintained to enable local authorities, private and voluntary organisations to check the suitability of those they propose to employ in child care posts.

35. The court considered the issues as follows:

> "(a) The nature and importance of the interests
>
> The importance of safeguarding children from harm of the type against which the Index is designed to give protection cannot be exaggerated. .... We find no difficulty in accepting that there is here in play a public interest which can qualify for protection if this is necessary and appropriate.
>
> (b) The degree of risk
>
> We recognise that there may be a few timid spirits who will be deterred from doing their duty if it is not clear that they cannot be sued for defamation. However, we find it difficult to accept that a local authority under the statutory duties to which the Authority is subject would be deterred from providing the appropriate information to the Service by the threat of litigation. We say this despite the straitened circumstances of local authorities….
>
> In fact, although as this case illustrates there will be employees, who if they are identified, will seek to bring defamation proceedings, the occasions on which they will have any prospect of success must be rare. There is no dispute that qualified privilege would be available in any event and so in order to succeed malice would have to be established on the part of the body responsible for the publication. Situations where the necessary malice can be established are likely to be rare….
>
> (c) The breadth of the immunity
>
> [after citing cases including *X v Bedforshire CC* [1995] 2 AC 633, the Court concluded that] … The wider the protection required the greater should be the caution before granting immunity from suit.
>
> (d) The point of principle
>
> … [Counsel] also calls attention to the important comment of Brooke L.J., with which the other members of the court agreed

in the case of *Waple*, … However notwithstanding these powerful submissions, if this was a case in which it was otherwise appropriate to extend protection, in our judgment it would be in accord with principle to do so.

We have already drawn attention to the fact that in *D v. NSPCC* the House of Lords extended protection to a new situation without waiting for Parliament to act. Here, the approach should be not to grant a blanket immunity but to provide immunity on a case by case basis when a clear need is established. There are considerable advantages in the courts determining whether to provide protection in light of the specific circumstances of individual cases as and when they come before the court…

(e) The balance between the public interests

There is a substantial public interest in "S" being able to vindicate his reputation. *In R. v. Lord Chancellor, ex parte Witham* [1997] 2 All E.R. 779 at 787, a citizen's access to the court was described as a common law constitutional right which could only be abrogated by specific statutory provision. That case was dealing with a very different issue from that under consideration here, but the judgment and the cases cited by Laws J. make self-evident the importance of the public interest of "S"which the Authority is seeking to abrogate.

It is obvious that having his or her name placed upon the Index has serious repercussions for the individual concerned. If the individual's conduct justifies this being done, then the existence of the Index means that his interests must give way to those of the children the Index is designed to protect. For the purposes of the present appeal we have to assume that "S"'s contentions are correct, and the allegations which are made against him are not only untrue but were made maliciously as well. If this be the position, then justice requires that "S" should be able to establish his innocence. The practical consequence to "S" of his name being on the Index is that he will not be able to work in his chosen occupation. The internal appeal provided by the Authority could have achieved his objective of establishing his innocence but this did not happen. As "S" has remained employed by the Authority, he cannot achieve his aim by bringing an action for unfair dismissal, but even if he could, if the Authority were entitled to immunity from proceedings for libel, it is arguable that the position should be the same in relation to an action for unfair dismissal.

The situation is, therefore, one in which the effect of granting an immunity from suit to the Authority will be a substantial infringement of the public interest in "S" having access to the courts. This infringement is, in our judgment, greater than is justified by what we regard as the insignificant risk of the

> effectiveness of the Index being impaired by an action for defamation.
>
> It follows, therefore, that the Authority has not established that it is necessary to protect the Index by providing immunity from suit."

36. In my judgment the public interests in the Council performing its duties in relation to a Child Protection Conference are the same as those in relation to the placing of names on the Index considered in the *Newham* case. The balance between that interest and a claimant's interest in vindicating his interest seems to me to be the same too. In both cases this is subject to what follows.

37. Since 1998 the Human Rights Act has come into force, and there have been developments in the law. But the language of the Court of Appeal shows clearly that that Court had the Convention in the forefront of their minds, notwithstanding that the 1998 Act was not yet in force.

38. The European Court of Human Rights has said more than once recently that the right to reputation is one of the rights guaranteed by Art 8 of the Convention: *Radio France v France* Application no 53984/00 judgment of 30 March 2004 para 31; *Cumpana and Mazare v Romania* Application no 33348/96, judgment of 10 June 2003 paras 48, 56 (a case where the publication complained of was a cartoon suggesting the complainant was having an extra-marital affair). The Court of Appeal has assumed that to be the law: *Greene v Associated Newspapers* [2004] EWCA Civ 1462 at [57]. I must do so also. The Claimant's Art 8 rights were in any event engaged in the Child Protection Conference, because he was a member of S's family, and if any action had been taken as a result of the concerns expressed in the words complained of, relating as they did to possible sexual abuse by him, that could have led to the most serious consequences for him, including on his relationship with both S and H.

39. Here it is plain that the Art 8 rights of the child are engaged, as well as those of the Claimant. The Council, as a public authority, has no rights. It is engaged in performing the duties, which are undertaken by the state in Art 8. A defendant to a libel action which is not a public authority is normally defending the right to freedom of expression under Art 10. As a public authority, the Council has no rights under the Convention. Only persons and non-governmental organisations have rights under the Convention: see Art 34. In some cases rights to receive information, under Art 10, rather than rights to express information, are engaged, when the public has an interest in receiving a communication which another (including a public authority) might propose to impart, and the publication of which is sought to be restrained, or made the subject of some sanction, by the court. That is not this case. No one is claiming the right to receive the information imparted in the words complained of in this case. So Art 10 is not engaged, unusually for a libel action.

40. Nevertheless this is a case where the Council and the court are concerned with competing convention rights, those of the Claimant under Art 8, and those of the child S, and of other children who may be affected. The purpose of the Child Protection Conference and so of the report was to perform the state's duties to S under Art 8, and, its duties to the members of S's family. Just as liability for damages in libel may constitute an interference with an individual's right of freedom of expression under Art 10 (*Tolstoy v UK* Application No 18139/91; [1995] 20 EHRR 442), so (in

principle) liability for damages in libel may constitute an interference with the Art 8 rights of a child or other person who might be protected by the state were the servants of the state, such as social workers, inhibited from making communications which they otherwise would have made. S's Art 8 rights may be infringed if a family member who presents a risk of harm to her is not prevented from doing so, and if a family member who presents no risk of harm to her is prevented from having normal contact with her.

41. The House of Lords has given guidance as to how a tension between competing convention rights is to be addressed by the court. *In re S (A Child)(Identification: Restriction on Publication)* [2004] UKHL 47; 3 WLR 1129 concerned the interplay of the Art 8 rights of a child for whom anonymity was being sought and the Art 10 rights of those who wished to communicate and receive reports of proceedings in court. There is no reason why the guidance given by the House of Lords should not apply equally where there is a tension between different Art 8 rights.

42. At [17] Lord Steyn said there were four propositions:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied in each case. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

43. This is consistent with what the Court said in *Newham*, as cited above:

> "Here, the approach should be not to grant a blanket immunity but to provide immunity on a case by case basis when a clear need is established"

44. This does not, however, mean that absolute privilege cannot exist at all. Although the case of the child in *In Re S* before the House of Lords was a very strong case of a threatened interference with Art 8 rights, the House nevertheless held that it was outweighed by the public interest in there being reports in the press of the criminal proceedings against the child's mother. Although absolute privilege was not directly in question in that case, but for there being absolute privilege in such reports, the child would have had a claim in libel in respect of any report defamatory of him that was not fair, and a claim in respect of any statement made in court that was defamatory of him. The decision of the House of Lords reflected the public interest, which is the rationale of absolute privilege in relation to reports of court proceedings. The possible injustices that might flow from application of that principle has been reduced by the various statutory restrictions on reporting referred to by the House of Lords in paras [19]—[21].

45. Absolute privilege has been considered directly by the ECHR in *A v UK* Application no 35373/97 (2003) 36 EHRR 51. In that case, it had been said by an MP in Parliament that the applicant was a 'neighbour from hell'. Her name and address had been given. The Applicant complained of interference with her rights under Art 6 and

Art 8. The Court rejected her complaint, in spite of agreeing with her that the words complained of were entirely unnecessary. The Court said:

> 77. The Court concludes that the parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.
>
> 78. The Court must next assess the proportionality of the immunity enjoyed by the MP. In this regard, the Court notes that the immunity concerned was absolute in nature and applied to both criminal and civil proceedings. The Court agrees with the applicant's submission that the broader an immunity, the more compelling must be its justification in order that it can be said to be compatible with the Convention. However, it reiterates its analysis in *Fayed* (cited above, pp. 53-54, § 77), as followed by the Commission in *Young*, to the effect that, when examining the proportionality of an immunity, its absolute nature cannot be decisive. Thus, for example, in *Al-Adsani*, cited above, the Court stated that measures taken by signatory States which reflected generally recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 (see also *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 36, ECHR 2001-XI, and *McElhinney v. Ireland* [GC], no. 31253/96, § 37, ECHR 2001-XI)….
>
> 85 The absolute immunity enjoyed by MPs is moreover designed to protect the interests of Parliament as a whole as opposed to those of individual MPs. This is illustrated by the fact that the immunity does not apply outside Parliament. In contrast, the immunity which protects those engaged in the reporting of parliamentary proceedings, and that enjoyed by elected representatives in local government, are each qualified in nature.
>
> 86. The Court observes that victims of defamatory misstatement in Parliament are not entirely without means of redress….
> 88 The Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, since

> the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued."

46. Neither *A v UK*, nor *In re S* encourages the recognition of new examples of common law absolute privilege. Given that a case by case approach is what is required, qualified privilege is the more appropriate avenue through which to approach it.

47. Mr Faulks QC submits that support for a new case of absolute privilege can be found in *D v East Berkshire* [2003] EWCA Civ 1151; QB 558. That is a report of three appeals heard together where parents, and in one case a child, brought actions in negligence against healthcare professionals and in one case a social services department claiming damages for alleged psychiatric harm caused by false allegations of child abuse by the parents against their children. The factual basis for the claim against Newham LBC in that case has similarities with the present case. It is set out in *X v Bedfordshire CC* [1995] 2 AC 633, 742G-744C. Concern had been expressed that the child had been sexually abused and a social worker employed by the local authority visited the mother's home to obtain details. The social worker reported his findings to a case conference, which decided to place the child on the child protection register. An interview was conducted by a psychiatrist in the presence of the social worker. At the end of the interview the mother was told by the psychiatrist and social worker that the child had been sexually abused and that XY [her current boyfriend] was the abuser. The doctor and social worker concluded that the mother would be unable to protect the child against further abuse by XY.

48. Lord Phillips of Worth Matravers MR gave the judgment of the Court. The Court concluded, as to negligence:

> "84 It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts…
>
> 86 The position in relation to the parent is very different. Where the issue is whether a child should be removed from the parents, the best interests of the child may lead to the answer yes or no. The Strasbourg cases demonstrate that failure to remove a child from the parents can as readily give rise to a valid claim by the child as a decision to remove the child. The same is not true of the parents' position. It will always be in the parents' interests that the child should not be removed. Thus the child's interests are in potential conflict with the interests of the parents. In view of this, we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of care should be owed to the parents. Our reasoning in reaching this conclusion is supported by that of the Privy Council in *B v Attorney General of New Zealand* [2003] 4 All ER 833.

> 87 For the above reasons, where consideration is being given to whether the suspicion of child abuse justifies taking proceedings to remove a child from the parents, while a duty of care can be owed to the child, no common law duty of care is owed to the parents.

49. Mr Faulks submitted that for the same reasons as led the Court to the conclusion that there should be no duty of care owed to parents, absolute privilege should apply to a claim in defamation.

50. But this argument proves too much. If absolute privilege did apply, it could not be limited to claims by parents. It would also apply to claims by children. A child may also be defamed by an allegation that she is, say, working as a prostitute. Absolute privilege attaches to the occasion of a publication, not to the subject of the publication. It cannot reflect the circumstances of a particular claimant, as can the duty of care at common law in negligence.

51. Concluding the consideration of negligence the Court said:

> "102 We would add one reflection which occurred to us after the hearing had been concluded. On one view of the facts this claim has the elements of a claim for defamation. There are statutory defences to such a claim, including that of qualified privilege. It cannot be open to a claimant to bypass these defences by advancing a claim for defamation in the guise of a claim for negligence".

52. The claim in defamation might, presumably, have been brought by the boyfriend accused of abuse, and possibly by the mother, accused of being unable to protect her child against further abuse. The implication is that the court considered that defeating the defence of qualified privilege placed a higher burden upon a claimant than proving negligence. But the Court does not appear to have contemplated that there was, or should be, a defence of absolute privilege.

53. The facts that gave rise to the cases in *D* predated October 2000, when the Human Rights Act 1998 came into force: [55]. But the Court of Appeal recorded at para [58] that :

> "58 It would have been open to the Government to argue that the statutory scheme in place satisfied the Government's positive obligation and that it was in the interest of the effective operation of the scheme that neither public authorities nor their employees should be subject to liability for shortcomings in relation to the decision of whether or not to take a child into care. Instead counsel for the Government submitted that after October 2000, when the Human Rights Act 1998 had come into force, a victim would be able to bring proceedings in the courts against a public authority for a breach of a substantive right and the courts would be empowered to award damages."

54. The Court of Appeal went on to quote at length, in particular at paras [65] and [67], from *TP and KM v UK* 34 EHRR 42 in which a parent had succeeded before the ECHR. The Court of Appeal noted at para [66] that the test applied by the ECHR

approximates to that which would be appropriate when considering whether there had been a breach of a duty of care. As cited by the Court of appeal at para [67], the ECHR found, at para 83 of its judgment:

> "The local authority's failure to submit the issue to the court for determination deprived her of an adequate involvement in the decision-making process concerning the care of her daughter and thereby of the requisite protection of their interests. There was in this respect a failure to respect their family life and a breach of article 8 of the Convention"

55. It follows that he Court of Appeal contemplated that a cause of action under the HRA would be available to a parent who could in principle succeed by satisfying the test appropriate in negligence.

56. The ECHR concluded that the decision of the House of Lords that the parent was owed no duty of care had the effect that she was denied an effective remedy: [68].

57. An effective remedy is now available in an action for damages for breach of Arts 6 and 8, under the Human Rights Act 1998, although success will be rare: *V (A child)* [2004] EWCA Civ 1575.

58. It is also to be noted that in *D* (para [113]) the judge had held that the local authority personnel were entitled to the protection of witness immunity. He had held that because they were potential witnesses in criminal or child protection proceedings that might result from their investigations, they could not be subject to a claim for negligence in relation to those investigations. At para [116] the Court of Appeal, referring to *Darker v Chief Constable of the West Midlands* [2001] 1 AC 435, reached the conclusion that the judge erred in making a firm finding that witness immunity precluded any liability on the part of those employed by the local authority. Mr Faulks accepted that the Defendants could not rely on witness immunity.

59. The plea of absolute privilege as formulated in the Amended Defence left it unclear as to the extent to which it was based on facts which are in issue. The plea as reformulated in the Re-Amended Defence cited above now makes clear that there is no issue of fact upon which the question depends.

60. I conclude that the words complained of were not published on an occasion of absolute privilege. It is not necessary for there to be such a defence to protect communications made on the occasion of a Child Protection Conference. For reasons given below, the public interest is met by the defence of qualified privilege.

61. Mr Barca also submitted that, if the occasion was one of absolute privilege, that defence could not apply to words which were irrelevant to the occasion. If I had held that the occasion was one of absolute privilege, I would have accepted that submission in principle. Lord Hoffmann was saying as much in *Taylor* when he said:

> "This formulation excludes statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels…"

62. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law, to be decided by the judge where there is a jury. Where the facts are

not in dispute it is commonly decided before trial, as contemplated by the Court of Appeal in *S v Newham*. Mr Barca referred me to Gatley at para 34.15, and in particular to *Law v Llewellyn* [1906] 2 KB 306. In that case it was alleged by the plaintiff that words spoken by a magistrate after making an order were outside the course of his functions. The Court decided on a strike out application that words "were clearly uttered under such circumstances as made them privileged".

63. I was addressed in some detail on the relevance of the words complained of in this case. In the light of my decision that the occasion was not one of absolute privilege, this issue does not arise at this stage. Relevance is an issue which also arises in relation to qualified privilege. I shall therefore address the facts relating to it further under that heading, if required.

QUALIFIED PRIVILEGE

64. In addressing the argument that a local authority is not concerned so much with the risk of an action succeeding, but with the expense and hassle which it will be caused by an action even when the action is unsuccessful, the Court in *S v Newham* said this at 1 FLR 1068B; EMLR 593:

> "Today this danger can and should be substantially reduced by court management of litigation. Where it appears doubtful that a plaintiff is going to be able to satisfy the onus which is upon him to prove malice, the court, mindful of the position of the defendant, should be prepared to require the plaintiff to deliver witness statements at an early stage of the proceedings so that the court can form an assessment as to whether the plaintiff has any prospect of successfully establishing malice. If the court is satisfied that the plaintiff has no prospect of success and is also satisfied there is no other reason why the action should be allowed to proceed then the action should be dismissed. (See the judgment of Sir Brian Neill in *Daniels v. Griffiths* [1998] E.M.L.R. 488 at 495.) Where the position is clear, the court can be expected to be robust. After all the courts regularly give judgment under Order 14 for the plaintiff where there is no defence and they should, especially in a case of this nature, be equally ready to give judgment for the defendant if the plaintiff has no prospect of success."

65. Whether the danger to the Council can be reduced in that way in this case depends on what the onus is upon the Claimant in proving malice. One of the reasons why Mr Faulks submitted that his argument on absolute privilege should succeed where it had failed in the past is because Mr Barca for the Claimant made submissions that the onus might not be as high as previously thought.

66. It is common ground that, subject to factual issues, in particular as to relevance and malice, a communication made at a Child Protection Conference will be protected by qualified privilege, if (as I have held) not by absolute privilege. The dispute is as to the treatment of publications irrelevant to the occasion, and the test of malice.

67. Mr Faulks contends that what he calls 'mere recklessness', as opposed to improper motive should not defeat the defence of qualified privilege in this case. He submits

that this is one of the exceptional cases recognised by Lord Diplock in *Horrocks v Lowe* [1975] AC 135, 150A where the defendants were "under a duty to pass on, without endorsing, defamatory reports made by some other person". In these exceptional cases he submits that a positive belief in the falsity of the report is not malice, and recklessness as to truth or falsity should not be malice either. The Second and Third Defendants' belief as to the truth of the words complained was, he submits, irrelevant to their duty to publish. He submits that the social worker is often not in a position to consider the truth of information. Their duty is to report allegations, regardless of their personal opinions as to their veracity.

68. Mr Barca's submissions are in two main parts. First he submitted that it is well established that irrelevant statements are not privileged. Secondly he submitted that a defendant "may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstance": see the New Zealand Court of Appeal in *Lange v Atkinson* [2000] NZCA 95 cited below.

69. As to irrelevant statements, Mr Barca submitted that there is an unresolved tension between the words of Lord Diplock in *Horrocks v Lowe* at p 151, and the speech of Lord Dunedin in *Adam v Ward* [1917] 309. This is discussed in Gatley at para 14.61. Mr Barca refers to what Eady J said in *Lillie & Reed v Newcastle City Council and others* [2002] EWHC 1600 (QB) para 1089 and 1388 (cited below) and to the following, which he submitted were consistent with the approach in *Lange*:

> "1381. No doubt it could be argued that these false claims made in the Report betoken a cavalier approach to the evidence from which it would be fair only to infer recklessness (i.e. indifference to portraying an accurate picture of the evidence). …"

70. Mr Barca submits that it is necessary to focus on what the particular duty in question really is, and to do so objectively, that is distinguishing what the duty is from what the defendant thought it was.

71. By reference to the Framework for Assessment, for example, para 1.58, and Working Together he submits that the duty is to communicate to, or share with, others only allegations or findings based on evidence. So he submits that there was no duty to communicate "half baked suspicions which [those who first raised the points] had not seen fit to include in their contemporaneous 2002 CAR".

72. Mr Barca submits that the words complained of were irrelevant, and should not have been included in the Report. It is admitted that the words complained of should not have been included in the Report. The Council's letter of 15 August 2003 states:

> "It is clear that no reference to this issue should have been included in the Social Worker's report and I apologise for the distress that this has caused you"

73. As to the test for recklessness, Mr Barca cited passages from the judgment of Eady J in *Lillie* including:

> "1388. Some of the statements made about the Claimants and about the evidence available to the Team were cavalier, in the sense that they disclose a perfunctory level of consideration when viewed "against the substance, gravity and width of the publication" (see the above citation from *Lange v. Atkinson*), so as to be consistent with a finding of indifference to truth. To take but one example, they claimed on page 41 of the Report that Child 14 alleged rape in her first video interview when she did nothing of the kind. This is surely not one of those cases where it could possibly be claimed that "a genuine belief in truth after relatively hasty and incomplete consideration may be sufficient to satisfy the dictates of the occasion" (see *Lange* at paragraph 48). By whatever standard, it seems to me that this statement was made recklessly. Yet, in the end, the case on malice succeeds because the Claimants have demonstrated, in the respects I have identified, knowledge on the part of each relevant Defendant that the material they were putting forward to support their conclusions was being misrepresented to their readers. Even if, therefore, Mr Bishop is correct (as I am assuming) in saying that I should not take the New Zealand decision into account at all when considering the notion of recklessness, as a matter of English law, it would make no difference to the outcome."

74. In response to this, Mr Faulks submits that *Lillie* is wholly different. Although it concerned allegations of sex abuse made by the Newcastle City Council, it did so in the context of a report published to the world relating to two nursery nurses, and in a context which had nothing to do with a Child Protection Conference. As to the statutory Guidance, he referred to Working Together paras 5.61, 5.63 and several paragraphs of Framework including para 1.59 (as to which he submitted that a hunch of an experienced social worker should not be lightly ignored). He noted that, given the length of involvement of local authorities with particular children, the files will be handed from one social worker to another to take over, so that the files should record everything. He referred to paragraphs relating to the sharing of information such as the words complained of here and submitted that it was necessary to give a person in the position of the Claimant an opportunity to deny what is said.

DISCUSSION

75. In *Horrocks v Lowe* the plaintiff complained of words in a speech delivered by the defendant, a councillor at a meeting of the Bolton Town council. On the question of whether irrelevant material could be protected by privilege, Lord Diplock said this at p 151:

> "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."

76. In *Lillie* Eady J commented on this passage as follows:

> "1089. There has sometimes been argument as to whether or not Lord Diplock's remarks at that point in his speech are in fact consistent with those of Lord Dunedin in *Adam v. Ward* [1917] A.C. 309, but for many years that passage has been treated as definitive. Indeed, if and in so far as there is any inconsistency with the earlier House of Lords decision, it would now be necessary to resolve it by reference to the terms and aims of Article 10 of the European Convention on Human Rights. There is little doubt that Lord Diplock's test would be less restrictive (or "chilling") towards freedom of communication. I intend to approach the matter by asking whether any material within the Report that could be characterised as not being "really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded" provides evidence from which malice could be inferred. It would not be appropriate to regard such material as detracting from the prima facie privilege attaching to the Report as a whole or, indeed, as leaving some part or parts of the Report outside its protection".

77. I respectfully agree. In any event, the point may not require to be resolved, because whichever view is adopted, it is possible that the progress or outcome of the trial may not be affected, particularly where trial is by judge alone (although it may be significant where there is a jury: see *Lange* para [25], since treating the issue as part of malice extends the role of the jury).

78. As to the test for malice, Lord Diplock said

"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.

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may

> be under a duty to pass on, without endorsing, defamatory reports made by some other person".

79. Lord Diplock then goes on to consider malice in cases other than the exceptional ones. He concludes that:

> "Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief." If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," that is, a positive belief that the conclusions they have reached are true. The law demands no more."

80. But this case is one of the exceptional cases. Lord Diplock did not have to address in terms what the test of malice was in such a case.

81. The reason that this is an exceptional case in that sense can be seen from an example canvassed in argument. Cases that come before social workers include ones where the adults in the family are at loggerheads. Allegations of sexual abuse, or risk of sexual abuse, can be made by a mother against a father or recent boy friend who she wishes not to have contact with her child. A social worker might not know whether or not to believe the mother in such a case. In a rare case the social worker might have a very strong belief that the mother is lying. The mother might even have admitted lying. Nevertheless, in all these cases, it might still be the duty of the social worker to raise these matters at a Child Protection Conference, in an appropriate case, and in an appropriate manner. What the mother says on such a topic, even if believed to be false, may have relevance to decisions which are to be made about the child's future. An experienced social worker will know that such allegations made by a mother may be true, even if improbable, and may be withdrawn by her, even if they are true,

depending upon what, for the time being, she hopes or fears that she or the child may receive from the man in question.

82. An example commonly cited of one of the exceptional cases is *Stuart v Bell* [1891] 2 QB 341. In that case an employee sued. The defendant in Newcastle had been shown a letter received by the Newcastle police from the Edinburgh police, stating that the plaintiff was suspected of having committed a theft. The defendant did not make any enquiry, but told the plaintiff's employer privately that the plaintiff was suspected of the theft. The employer dismissed the plaintiff as a result. The members of the Court differed as to whether the occasion was privileged. The majority held that it was, and all members of the court agreed there was no case on malice.

83. Lindley LJ was the only member of the Court to consider malice in detail. He said at p351:

> "If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him, as was settled in *Clark v. Molyneux* (1877) 3 QBD 237. Malice, in fact, is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L.J., every wrong feeling in a man's mind: *Clark v. Molyneux* at p 247. There is no question here of the belief by the defendant in the truth of what he said. He did not say or intimate that the plaintiff had stolen a watch - he merely stated that the Edinburgh police suspected the plaintiff of having done so, which was true enough. This case illustrates the truth of the remark made by Lord Bramwell in *Clark v. Molyneux* at p 244. He said, "A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character as on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander?" What, therefore, has to be ascertained is whether the defendant acted bonâ fide in the discharge of that moral duty which he owed to Stanley or whether he acted from some other unjustifiable motive - from some motive other than a sense of duty. As Lord Bramwell said in *Clark v. Molyneux* at p 245, "If the defendant was actuated by some motive other than that which would alone excuse him the jury may find for the plaintiff." (See also page 246, per Brett, L.J.)"

84. In Gatley at para 16.19, the editors refer to the cases where a person may honestly make a statement without believing it to be true and add:

> "In principle this extends to a case where the defendant in performance of a duty passes on a statement which he knows to be untrue but he would not be protected if he failed to include contradictory evidence in his possession".

85. Lindley LJ's statement (that what has to be ascertained is whether the defendant acted bonâ fide in the discharge of that moral duty which he owed to Stanley or whether he

acted from some other unjustifiable motive - from some motive other than a sense of duty) is consistent with what Lord Diplock said at p150-151:

> "Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found."

86. In *X v Bedfordshire* it was contemplated that social workers could be liable if misfeasance were established: see p700 (Sir Thomas Bingham MR), p712 (Evans LJ) and p731 (Lord Browne-Wilkinson) and F v Wirral Borough Council [1991] 2 All ER 648, 687. In *Lange v Atkinson* at para [45] (quoted by Eady J in *Lillie* at para 1291) reference is made to the discussion of recklessness in the then recent decision in *Three Rivers DC v Bank of England* [2003] 2 AC 1. At p191 of that case Lord Steyn summarised the mental element of misfeasance as follows:

> "First there is the case of targeted malice by a public officer, i e conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."

87. There is therefore no inconsistency in the approach of the House of Lords in *X v Bedfordshire*, relied on by Mr Faulks, and a decision that malice in the sense explained by Lindley LJ in *Stuart v Bell* is what is required to be proved by a claimant in cases such as the present.

88. I conclude that malice in this sense is what is required to be proved.

89. In *Lillie* Eady J was not addressing one of the exceptional cases. The defendants in that case did not contend that they might be under a duty to publish what they did not believe to be true. So that case is not directly in point. The passage in para 1388 of *Lillie* also shows that Eady J did not have to decide the meaning of recklessness, because he found that the defendants knew of the falsity. In the present case it is not alleged that the Second Defendant knew of the falsity of the words complained of. In

the present case, the issue of recklessness does arise, but not in the sense which Eady J was considering. It is not recklessness which, if proved, is the equivalent of knowledge of falsity, and thus of malice. It is recklessness which, if proved, might be evidence that the communication was made for some motive other than a desire to perform of the duty in question.

90. In *Lange v Atkinson* [2000] NZCA 95 the Court said:

> "47. What constitutes recklessness is something which must take its colour from the nature of the occasion, and the nature of the publication. If it is reckless not "to consider or care" whether a statement be true or false, as Lord Diplock indicated, it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of the publication) can also be reckless. It is within the concept of misusing the occasion to say that the defendant may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstances. In essence the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement."

91. In *Lange* the Court were not concerned with one of Lord Diplock's exceptional cases, so the analysis is not directly in point. On the approach to *Lange*, (if *Lillie* were not distinguishable from this case), I would follow what Eady J, for the reasons he gives. He said in *Lillie* at paras 1294-1296:

> "1294 I do not believe, therefore, that Mr Bishop is construing the judgment correctly when he submitted that I was being invited by Miss Page to depart form *Horrocks v. Lowe* and conclude "that a test of reasonableness or responsibility should suffice to defeat the claim of qualified privilege". The New Zealand court was attempting to explain some of the factors that may need to be considered in deciding whether a case of recklessness has been made out. It was expressly stated that indifference to truth is not the same thing conceptually as failing to take reasonable care. Mr Bishop argues that "No amount of carelessness, prejudice or bias can turn honestly held beliefs into ones that are not honestly held. By an elision, the New Zealand court has turned the traditional subjective test of malice into an objective one". I do not believe that is a fair interpretation. No one can know what goes on in the mind of another except by examining the available evidence. Carelessness can never be equated to indifference to truth but, depending on the circumstances, it may be some evidence of it.
>
> 1295 Nevertheless, he rightly points out that in *Loutchansky v. Times Newspapers Ltd (No.2)* [2002] 1 All E.R. 652 (at para. 25) the Court of Appeal did refer to the New Zealand Court as having "redefined the concept of actual malice to provide a stronger safeguard against abuse". I should, therefore, steer

> clear of the New Zealand Court's terminology, however cogent and persuasive, lest I be thought in so doing to depart from *Horrocks v. Lowe*, within the confines of which I should look for the English law of malice.
>
> 1296 I understand that Miss Page would wish me to take the reasoning of the New Zealand Court into account in determining whether or not the Review Team had a genuine belief in some of the claims they were making in their Report for the evidence supporting widespread abuse, pornography and the participation of the Claimants in a paedophile ring. The effect of her submission would be that a perfunctory level of consideration in a situation where the allegations are of the utmost gravity, and intended to receive widespread publicity, can be taken into account as part of the evidence to be weighed in deciding whether to draw an inference of indifference to truth. While recognising that carelessness in itself is not to be equated with recklessness, it would have seemed to me that this proposition is unexceptionable as a matter of English law, if the matter were free from authority in England, but the Court of Appeal have approached the *Lange* decision as redefining the concept of malice and I should not therefore go down that road."

92. I also note para 49 of *Lange*, which reads as follows:

> "49. A case at one end of the scale might be a grossly defamatory statement about a Cabinet Minister, broadcast to the world. At the other end might be an uncomplimentary observation about a politician at a private meeting held under Chatham House rules. It is not that the law values reputation more in the one case than the other. It is that in the first case the gravity of the allegation and the width of the publication are apt to cause much more harm if the allegation is false than in the second case. A greater degree of responsibility is therefore required in the first case than in the second, if recklessness is not to be inferred. "

93. What is included in a Report for a Child Protection Conference is for publication in confidence to a small group of people with specific roles in the life of a child. While the publication can still cause grave harm, the extent of that harm can be mitigated by the subsequent actions of the defendants, and by the denials of the Claimant himself. It may not be a context in which the same very high degree of responsibility would be required as in, say, publication to all the world.

94. Accordingly, I conclude that in the present case, that I must first decide whether either or both of the First and Second Defendant acted in good faith in the discharge of their duty under the Children Act 1989 or whether the Claimant can and does establish that they acted from some other unjustifiable motive - from some motive other than a sense of duty. And in the words of Lord Diplock, I must decide whether the Claimant can, and has, established that the Second and Third Defendant's desire to comply with the relevant duty played no significant part in his motives for publishing what he they

did. If I find that, the plea of privilege be defeated. On the other hand, in the words of Eady J in *Lillie* at para 1094, it may be that:

> "if I were to come to the conclusion that their primary purpose was … ultimately the protection of children, there would be no scope in this case for an adverse finding of "dominant motive""

95. Mr Faulks submits that no such motive is pleaded, and so that the claim is bound to fail, it being common ground that the occasion is one of qualified privilege. I have not been addressed on this aspect of the case, that is, what is or is not pleaded in the Reply, or contained in the witness statements, in relation to qualified privilege. I will hear argument on this after this judgment has been handed down. As is clear, questions of malice are closely linked to meaning. See for example *H v Chief Constable of Hampshire* [2003] EWCA Civ 102 and *Alexander v Arts Council of Wales* [2002] 1 WLR 1840.

96. While carrying out this exercise, I must bear in mind the guidance of Lord Steyn, cited above:

> "… where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied in each case."

97. I also bear in mind the passage from the judgment of Eady J in *Galloway v Telegraph* [2004] EWHC 2786 (QB):

> "132. As Mr Rampton pointed out, the reasoning and guidance given in the appellate courts in England over recent years, including that in *Reynolds* itself, is supposed to be Convention compliant. This may be obvious, but it is fundamentally important. It is not, therefore, for individual judges in every case that comes along to apply and interpret the Convention afresh. If one applies the English law of defamation properly,
> there should be no reason to think that the principles underlying the Convention are infringed: *Branson v Bower* [2001] EMLR 800 at [8]. This is more particularly so with regard to appellate decisions".

98. There is at present no reason for me to suppose that the application to the facts of this case of the law of qualified privilege as hitherto understood will do otherwise than satisfy the test laid down by Lord Steyn. But in the event that it appeared that the law of qualified privilege did not appear to lead to the result that would be achieved by the application of Lord Steyn's guidance, it does not follow that it would necessary to reconsider the law of libel. What to do in such a situation would require consideration at that time.

99. In actions tried before the coming into force of the Human Rights Act, it may have been the case that if the outcome of a libel action were not otherwise Convention compliant, the law of libel would require to be re-interpreted to make it so. Otherwise there may have been no effective remedy, or an unjustifiable interference with the rights of another. That may still be the case. But there is a new factor. There is now another cause of action under HRA s.7 in which claimants can enforce their rights

under Art 8. If the outcome of a libel action against a public authority appears not to give a remedy for an interference with a claimants rights under Art 8, then it may be that he has an effective remedy under HRA s.7, or, rather, that the question of whether or not he should have a remedy for the interference might better be considered under the direct action to enforce Art 8 rights.

100. I have not been addressed on the remedies available to parents, and those in the position of the Claimant, under ss7 and 8 of the Human Rights Act 1998 for acts done by social workers employed by a local authority which are incompatible with Art 6 and 8. An example of such a case is *V (A Child)* [2004] EWCA Civ 1575 referred to above.

101. What may appear to be a disadvantage to some claimants is that there are other hurdles that have to be overcome, particularly if damages are to be obtained: s8(2)-(4).

102. On the other hand, s.8(1) enables the court "to grant such relief or remedy, or make such order, within its powers as it considers just and appropriate". In a case where qualified (or absolute) privilege would be a defence to a libel action, this may be highly significant to a claimant. Privilege is available as a defence in cases where the words complained of are, or may be, false. Of course, the claimant benefits from the presumption of falsity. But if he wishes to clear his name, and obtain public vindication, that is difficult to achieve. Even if he succeeds in defeating the defence of privilege, the court will not have investigated the truth or falsity of the words complained of, and his reputation will be vindicated only on the presumption of falsity. If he fails to defeat the plea of privilege, he gets nothing by way of damages. In either case he can point to the absence of a plea of justification, and to the presumption of falsity.

103. However, it is possible, in an appropriate case, that a court might, in a claim under s.7 of the HRA, be willing to investigate the truth or falsity of words complained of, and to grant some declaration, even if the claim is clearly one to which a defence of privilege would be available, if brought in libel. Comparison may be made with the Data Protection Act 1998, which was implemented to give effect to Art 8 rights in relation to personal information, and which made those rights available against anyone (if the statutory conditions are fulfilled) and not just against public authorities. Remedies of rectification and erasure are available under s14, subject, of course, to the provisions of the Act. The focus of the Court's inquiry would not be confined, as it is in a libel action, mainly to the state of mind of the defendant, and to the proceedings only in so far as they could be relied on in aggravation of damages. The court would be asked to look at the proceedings as a whole.

104. Given the fact the terms of the First Defendant's letter of 15 August 2003, and that the focus of the Claimant's case is upon the claim for aggravated damages, it might be thought that this case should be viewed in the light the HRA s.7 and 8, whether or not it is also a libel action.

105. Whether or not it is open to the Claimant (if so advised) to ask the court to give relief under HRA s.8 in this action, or some other action, has been canvassed by me during argument, but is not a matter on which I have been specifically addressed.