

## 2.4 Defamation Costs

### Introduction

2.401 We are often asked to provide guidance on whether a local authority can meet the costs of a defamation action taken by or against a member or an employee of the authority. In this article we outline our view and discuss the way in which the defence of qualified privilege applies to local authorities.

### Can Local Authorities Fund Defamation Actions?

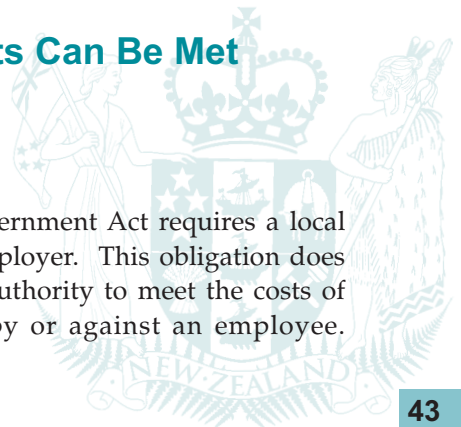
2.402 In our view, a local authority can meet the costs of a defamation action taken by or against a member or an employee where:

- the action is taken to protect the interests of the local authority member or employee in his or her capacity as an authority member or employee, as opposed to his or her interests as an individual; and
- the local authority is satisfied that it would be in the interests of the city, district or region for the action to be taken, or defended, at the authority's expense.

### The Extent to Which Costs Can Be Met

#### For Employees

2.403 Section 119F of the Local Government Act requires a local authority to act as a good employer. This obligation does not, in our view, require an authority to meet the costs of a defamation action taken by or against an employee.



However, giving such support would clearly be consistent with the obligation, provided that the subject matter of the defamation action relates to something done or said by the employee in the course of his or her employment.

### *For Members*

- 2.404 A local authority is a statutory body and, as such, its powers are limited by the statutes that regulate it. The Local Government Act does not expressly authorise local authorities to meet the costs of defamation actions taken by or against authority members.<sup>15</sup>
- 2.405 Nevertheless, in our view a local authority can meet (or contribute towards) the costs of a defamation action, taken by or against a member or an employee of the authority, using the “unauthorised expenditure” provision contained in section 223k of the Local Government Act.<sup>16</sup>
- 2.406 Defamation litigation can be notoriously prolonged and expensive. When making a commitment to meet the cost of such litigation in respect of a member, local authorities should be mindful of the limited nature of the expenditure authorised by section 223k.

### *Conditions of Funding*

- 2.407 A risk exists that a decision to fund a defamation action could be seen as providing an “open cheque book” to a local authority member or employee. Such a perception could create a disincentive for the member or employee (who may feel extremely wronged by a defamatory comment) to work towards a settlement of proceedings.

<sup>15</sup> Section 707 of the Local Government Act 1974 provides for a council to deal with legal proceedings involving the local authority, rather than the individual member.

<sup>16</sup> Under section 223k, a local authority whose district has a population not exceeding 100,000 people can spend up to \$20,000 in any financial year on unauthorised expenditure, while a local authority whose district has a population in excess of 100,000 can spend up to \$50,000.

- 2.408 In our view, funding should be provided so that the local authority is able to:
- control the choice of legal representation for the member or employee;
  - control the costs of the action; and
  - review its support if the member or employee fails to pursue reasonable settlement opportunities.
- 2.409 As part of the agreement to meet the costs of taking or defending a defamation action, we think it reasonable for the local authority to expect the member or employee to agree to refund the costs met out of any money that is awarded or paid as a result of the action.

### Liability Insurance

- 2.410 In our 1998 report,<sup>17</sup> we commented on the indemnification of members and employees of local authorities from personal liability by way of liability insurance. We noted that authorities have the power to indemnify members and employees against personal liability for actions arising out of their duties as members or employees.<sup>18</sup>
- 2.411 Depending on the coverage of the particular policy, liability insurance could be called upon in the event that a member or an employee of a local authority faced an action in defamation. Where liability insurance is available for a *member*, we consider that the authority would not be restricted by the limited nature of the expenditure authorised under section 223k, except to the extent that the policy required the authority to pay an excess.

## The Defence of Qualified Privilege

- 2.412 A defamation action cannot succeed if the defamatory material is privileged. Two types of privilege exist – absolute privilege and qualified privilege.

<sup>17</sup> *First Report for 1998*, parliamentary paper B.29[98a], pages 23-30.

<sup>18</sup> Section 223j(1)(a), Local Government Act 1974, which allows a local authority to spend money for the *insurance of, or the making of any other prudent and reasonable financial provision against any risk facing the local authority, its assets, or its interests.*

- 2.413 The defence of *absolute privilege* does not apply to local government. It protects proceedings in Parliament, judicial proceedings, and communications for the purpose of obtaining legal advice between legal advisers and clients.
- 2.414 The defence of *qualified privilege* can apply in a wide variety of situations, including various local government situations. The defence is based on:

*[A]n identified public interest in allowing people to speak and write freely, without fear of proceedings for defamation unless they misuse the privilege. On occasions of privilege the public interest is seen as prevailing over the protection of individual reputations.<sup>19</sup>*

- 2.415 The defence of qualified privilege is found in statute (the Defamation Act 1992 and Local Government Official Information and Meetings Act 1987 (LGOIMA)) and the common law. In the remainder of this article, we discuss the way in which the defence applies to local authority members and employees.

### Protection Available to Members

- 2.416 Section 53 of LGOIMA provides that any oral statement made at a meeting of a local authority will be protected by the defence of qualified privilege – as long as the statement is made in accordance with the authority’s rules for the guidance and order of its proceedings (e.g. its standing orders).
- 2.417 If a member was to make an offensive remark about the private affairs of another member at a local authority meeting, that remark is likely not to be protected by section 53 of LGOIMA – as such a remark is likely to be in contravention of the authority’s standing orders.

- 2.418 Section 53(2) of LGOIMA provides that the defence will not be available if the plaintiff can show that the defendant, when publishing the material:

- was predominantly motivated by ill will towards the plaintiff; or
- otherwise took improper advantage of the occasion of publication.

<sup>19</sup> *Vickery v McLean*, unreported, 20 November 2000, CA125/00.

2.419 Section 52 of LGOIMA protects local authority members from a defamation action if defamatory material is published in either the minutes of a local authority meeting that was open to the public or the agenda<sup>20</sup> for that meeting.

### *Protection Available to Employees*

2.420 The defence of qualified privilege will also protect any oral statement made by a local authority employee during a meeting of the authority that is open to the public.<sup>21</sup> This defence will not apply if:

- the oral statement was made in contravention of the authority’s rules; or
- the employee *was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.*

2.421 The Defamation Act 1992 also lists a number of matters that will be protected by the defence of qualified privilege. One matter that is relevant to local authority employees is that the defence protects a fair and accurate report or summary of a statement, notice or other matter, issued for the information of the public by any local authority or officer of the authority.

2.422 However, section 19 of the Defamation Act also negates the defence on the grounds of “ill will” or “taking improper advantage”.

### *The Common Law Defence of Qualified Privilege*

2.423 The defence of qualified privilege is not limited to the matters set out in LGOIMA and the Defamation Act. This means that a local authority member or employee may be able to avail themselves of the defence of qualified privilege where they have made a defamatory statement that does not fall within the circumstances set out in LGOIMA or the Defamation Act.

<sup>20</sup> Any further statements or particulars that are attached to the agenda for the purpose of indicating the nature of any item on the agenda will also be protected.

<sup>21</sup> Section 53 of LGOIMA.

2.424 The defence exists generally where the maker of a statement has a duty to make the statement and the recipient of the information has a duty or interest in receiving it. One example of the common law application of the defence was discussed in the case of *Lange v Atkinson* [2000] 3 NZLR 385 (*Lange No. 2*).

2.425 The origin of *Lange No. 2* was a claim in defamation by the Rt Hon David Lange against the author of an article published in a magazine with a New Zealand-wide circulation, and against the publisher of the magazine.

2.426 In *Lange No. 2*, the Court of Appeal reconsidered the circumstances in which qualified privilege is available as a defence to defamatory political statements that have been widely published. The Court reconfirmed that qualified privilege does apply to such statements, and stated:

- (1) *The defence of qualified privilege may be available in respect of a statement which is published generally.*
- (2) *The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.*
- (3) *In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.*
- (4) *The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.*
- (5) *The width of the identified public concern justifies the extent of the publication.*
- (6) *To attract privilege the statement must be published on a qualifying occasion.<sup>22</sup>*

<sup>22</sup> This point was added to the five-point summary given in the 1998 judgment; see paragraph 41 of *Lange No. 2*.

2.427 The defence discussed in *Lange No. 2* is limited to defamatory statements, which are widely published, about people who are elected or seeking election to Parliament only. The Courts have not yet determined whether the defence should be extended to apply to defamatory statements made about elected members of local authorities, or those seeking election to local authorities. The Court of Appeal discussed such an extension in the recent case of *Vickery v McLean*.

## The Case of *Vickery v McLean*

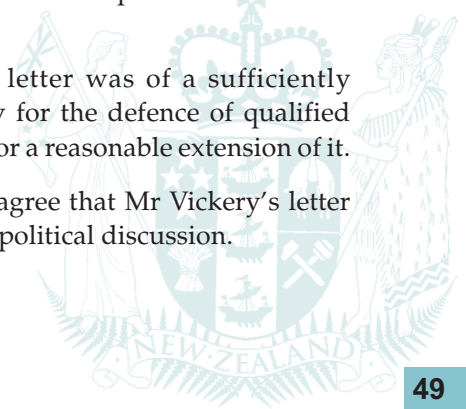
2.428 The case of *Vickery v McLean* involved three employees of Papakura District Council (the Council) who alleged that they had been defamed by a long-term resident of the Papakura district, Mr Vickery.

2.429 In early-1997, Mr Vickery had become suspicious of a proposal by the Council to franchise the district's water and wastewater services. In June 1997, he wrote to the Serious Fraud Office suggesting that it should question *all councillors and executive staff* in relation to "corrupt dealings" regarding the franchising proposal. Three days later, he wrote to two local newspapers and one national newspaper about the Council's franchise decision. In his letter, he set out his view that *[t]here was serious enough circumstantial evidence to suggest that criminal irregularity may have taken place*.

2.430 Mr Vickery argued that:

- The defence of qualified privilege protected his letter to the newspapers. In making this argument, he was attempting to extend the scope of the defence beyond what was determined in the well-publicised case of *Lange No. 2*.
- The subject matter of his letter was of a sufficiently "political" nature to qualify for the defence of qualified privilege under *Lange No. 2* or a reasonable extension of it.

2.431 The Court of Appeal did not agree that Mr Vickery's letter could sensibly be regarded as political discussion.



- 2.432 Furthermore, the Court noted that even if the subject matter had been political discussion, it involved allegations of serious criminality. Such allegations, if made on a good faith basis to the appropriate authorities, are protected by qualified privilege. However, the Court noted that the privilege is lost if the allegations are published on a wider basis.
- 2.433 In conclusion, the Court of Appeal held that it was unnecessary for it to decide, for the purposes of the case, whether the defence of qualified privilege should be extended in this way. Mr Vickery's appeal was dismissed and the judgment of the High Court, awarding the three Council employees \$55,000 in compensatory damages, was upheld.
- 2.434 The significance of the Court of Appeal's decision for local authorities is that it leaves unresolved the issue of whether the defence of qualified privilege can protect defamatory political statements, that are widely published, about elected members of local authorities, or people seeking election.

### Election Year

- 2.435 We acknowledge that in an election year members of local authorities may be more prone to make statements that may be seen as defamatory about fellow members or prospective members. Such statements, if made about elected members of Parliament or those seeking election to Parliament, may be protected by qualified privilege. However, until the defence is extended to cover local government, local authority members should tread carefully when making potentially defamatory statements about others in an election year or otherwise.

