Neutral Citation Number: [2009] EWHC 1550 (QB)

Case No: TLJ/07/1122

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2009

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Jane Clift	**Claimant**
- and -	
(1) Slough Borough Council	**Defendants**
(2) Patrick Kelleher	

- -
- -

Mr Hugh Tomlinson QC and Miss Christina Michalos (instructed by **Simons Muirhead & Burton**) for the **Claimant**
Mr John Beggs QC (instructed by **Barlow Lyde & Gilbert**) for the **Defendants**

Hearing dates: 15-19, 22-24 June 2009

- -

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.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat:

1. The Claimant ("Ms Clift") was a resident of Slough. On 10 August 2005 she witnessed some anti-social behaviour in a park in Slough. Flower beds were damaged and she was herself threatened when she intervened. She called the police and the parks department of the First Defendant ("the Council"). Police officers and a Park warden attended. They recommended that she refer the matter to the Council, and she was given the direct line of the Council's Anti-Social Behaviour Co-ordinator, Ms Rashid. On 11 August Ms Clift telephoned Ms Rashid. The conversation went very badly. Ms Rashid threatened to terminate the call and Ms Clift did terminate it. On 12 August Ms Clift wrote a letter of a complaint about Ms Rashid's conduct to the Council. The Council in due course appointed the Second Defendant ("Mr Kelleher") to investigate the complaint. He is Head of Public Protection. He held interviews with Ms Clift on 25 October and with Ms Rashid and other witnesses in the following days. On 30 November 2005 Mr Kelleher notified Ms Clift by letter of his decision. He rejected her complaints. He also referred to Ms Clift's letter of 12 August and their meeting of 25 October. He informed her that these (and something else she had said to another officer on 12 August) amounted to violent and threatening behaviour, and that a marker was to be placed against her name for 18 months and shared with other council departments and government agencies within the borough by electronic means. This decision was shared, or published, within the Council, and to some outside it, by e-mails. Ms Clift was affronted and has brought these proceedings for libel on those publications. She said they meant that she was a violent person who had engaged in threatening behaviour on a number of occasions.

2. The defences to the claim for libel included justification and qualified privilege at common law. The particulars of justification were the matters referred to in the letter of 30 November. The reply alleged malice. The only person alleged to have been malicious is Mr Kelleher. It is alleged that he knew the words complained of to be false, or in the alternative, that his dominant motive in writing the email and authorising the entry on the Register was not to promote the safety of employees of the Council or anyone else, but to dispose of Ms Clift's complaint and marginalise her.

3. At the close of the Defendants' case, and after hearing legal argument, I made three rulings: first that there was a case on justification to go to the jury; and second that there was a case on malice to go to the jury. The third ruling related to the defence of qualified privilege at common law. I ruled that there was such a defence in respect of publication to certain publishees, but not in respect of publication to others.

4. The ruling on whether the publications were made on an occasion of qualified privilege raises matters of general importance. The classic statement of the law on qualified privilege at common law is to be found in *Adam v.Ward* [1917] AC 309 at 334. Lord Atkinson said:

> "A privileged occasion is …. an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The reciprocity is essential".

5. The first set of publications was in an e-mail sent by Mr Kelleher to 54 addressees (to be forwarded to 12 others). He was acting in the course of his official duties. The second set of publications was also by e-mail in the form an attachment containing a Register ("the Register"). These publications were authorised by Mr Kelleher. The Register was entitled the Violent Persons Register, but it ought to have been entitled the Potentially Violent Persons Register.

6. The words complained of contain personal information relating to Ms Clift. That is data which is subject to the Data Protection Act 1998 ("DPA"). This Act implemented in English law some of the rights recognised by Article 8 of the European Convention on Human Rights ("the Convention"). Later those rights were more fully incorporated into English law by the Human Rights Act 1998 ("HRA"). The Council is a public authority. HRA s.6 (1) provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention Right".

7. Article 8 of the Convention reads, so far as material:

> 'Right to respect for private and family life
>
> (1) Everyone has the right to respect for his private … life, ….
>
> (2) There shall be no interference by a public authority with the exercise of this right except such is in accordance with the law and is necessary in a democratic society … for the prevention of disorder or crime… or for the protection of the rights and freedom of others".

8. The question in this case is whether, and if so how, the Council must demonstrate that it has complied with its public law duties under HRA (and incidentally DPA) if it is to be able to assert that it has the interest or duty required at common law for there to be a defence of qualified privilege.

EVENTS LEADING TO THIS ACTION

9. As a responsible employer the Council has a policy to protect its employees from violence at work. The policy is set out in a document headed "Safe System of Work (Codes of Practice) H&NS/COP/1.14 Version 1.0 date issued 11/3/03 Violence at Work (Inc Potentially Violent Persons)" ("the Policy").

10. The two documents containing the words complained of were circulated in purported pursuance of that Policy.

11. Ms Clift was a lady of about 40 years of age at the time in question. On the morning of 11 August 2005 she had witnessed a group of five people in the public park drinking. A child of about 3 years of age was pulling plants up from a flower bed and damaging other plants. Ms Clift protested at this behaviour and was herself

threatened by one of the men. In addition he himself trampled the flower bed in response to her intervention.

12. Ms Clift was very angry indeed at what had happened in the park and by what, in her view, was the inappropriate response by Ms Rashid and the officer to whom she complained. Ms Clift is an articulate person. On 11 and 12 August she wrote down her account of what had happened in the park, and in the conversation with Ms Rashid, in a three page letter. The penultimate paragraph of the letter includes the following words:

> "I did not want to give [Ms] Rashid the self satisfaction of terminating the call – I slammed my phone down so hard I broke it. I felt so affronted and filled with anger that I am certain that I would have physically attacked her if she had been anywhere near me. I truly am not of that nature and so, surely, this should act as a wake up call to the Borough as to the capacity she has for offending people…. "

13. Ms Clift also used forceful language in response to the suggestion by the first official to whom she complained, that she speak to Ms Rashid again. Ms Clift said "Right now I wish she would drop dead".

14. The interview of Ms Clift by Mr Kelleher on 25 October 2005 took place in a room in the Council's offices. Only Ms Clift and Mr Kelleher were present. Mr Kelleher took a note of what occurred at that meeting. It includes the following:

> "[Ms Clift] wants every avenue explored and feels that [Ms Rashid had no knowledge of legal options open to [the Council] stunned that [Ms Rashid] is in the post. Stated that she would have hit [Ms Rashid] if she could. Wants her out of the post. Threatened that she will take the matter to the Ombudsman".

15. Mr Kelleher then conducted a number of other interviews. One was with Mr Gulfraz, a friend of Ms Clift. She was accustomed to helping him in making telephone calls and filling out official forms. She was at the time also helping him in a complaint he was making against the Council on a housing matter. He was present at the time Ms Clift made her call to Ms Rashid on 11 August. He heard the whole conversation over the speaker phone. Other witnesses were fellow employees of Ms Rashid. Ms Rashid did not have the phone on loud speaker but her colleagues sitting near her heard her side of the conversation. It was sufficiently unusual to attract their attention.

16. Having interviewed Ms Rashid and these other witnesses, and made other enquiries, Mr Kelleher wrote his letter of 30 November 2005. It covers four pages and also dealt with another complaint Ms Clift had made relating to a quite separate matter. She had asked the Council for help earlier in the summer about a noise nuisance at her home, and she complained about how the Council had dealt with that. Mr Kelleher rejected that complaint too.

17. Having set out in full his reasons for having rejected her complaints, Mr Kelleher gave four reasons why a marker was to be placed against Ms Clift's name:

> - On 10 August 2005 you slammed the phone down on Ms Rashid
>
> - In your subsequent letter dated 12 August 2005 you stated 'I am certain that I would have physically attacked her (Ms Rashid) if she had been anywhere near me'
>
> - During our meeting on 25 October 2005 you again stated that you would physically attack Ms Rashid if you could, and repeatedly demanded that the local authority sack her
>
> - During a telephone call to our corporate team on 12 August you are reported to have said that you 'wished [Ms Rashid] would drop down dead'.

18. He concluded the letter saying that:

> "The local authority will continue to provide you with your normal range of services, but you can anticipate that suitable arrangements will be put in place to ensure the safety and wellbeing of our staff."

19. The following day Mr Kelleher sent the email to 54 individuals who were officers or employees of the council. The subject read, "Violent Person Register - Ms Jane Clift". The text of the email is the first of the words complained of:

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

20. Mr Kelleher requested that a hard copy of that email be provided to each of the council's community wardens. There were twelve such. Accordingly there were 66 publishees of the email.

21. Also on 1 December 2005 Mr Kelleher filled out a standard form prepared in accordance with the Policy. It is known as a Violent Incident Report Form. Against the printed question, "Was the incident classified as (please tick all that apply)" there is entered "shouting and threats". In the box for details of the incident, there is a reference to the paragraph of the letter of 30 November containing the four reasons cited above. The staff member said to be involved is identified as Ms Rashid. The witnesses identified are Mr Kelleher himself and the complaints officer to whom Ms Clift had spoken on 11 or 12 August. The form is signed by Ms Rashid and Mr Kelleher. This form was completed on the advice of Mr Satterthwaite.

22. Mr Satterthwaite is the author of the Policy and the officer of the Council responsible for compliance with Data Protection and other related matters. He maintains the Register. It is a document prepared on Excel spreadsheet software. It contained ten columns and, at the relevant time, about 150 rows. Each row related to a person identified by name and address given in the first two columns. Ms Clift's name was entered on the Register by Mr Satterthwaite upon information provided by Mr Kelleher. Details of the incident are given in column 5 as "threatening behaviour on several occasions". The duration for which the person is to remain on the register is given in column 8 and in respect of Ms Clift the period is 18 months. The ninth column contains a title "Risk Rating VH, H, M and L" the entry for Ms Clift is M for medium. Two entries are admittedly inaccurate. The location of the incident is given at column 4 as "via correspondence". The date of the incident is given in column 6 as "30/11/2005".

23. For purposes of comparison the person on row 99 was described as being involved in an incident of "shouting, sexual abuse, threats", and was entered for a duration of 1 year, and of medium risk. The person at row 102 is described as "shouting/pushing/attack", 15 months, medium risk. The person on row 107 is against the incident report "aggressive behaviour, damage and the Council employee prevented from leaving (hostage)", duration 2 years, medium risk.

24. The precise means by which the Register was circulated did not emerge clearly in evidence. Ms Clift protested immediately at her inclusion on the Register and asked if there was a right of appeal. She was informed there was not. In a letter dated 13 December 2005 Mr Satterthwaite (signing himself as Data Protection/ Health and Safety Co-ordinator) explained his decision in terms which implied that the Register had already been circulated by that date, as might be expected. Some information as to whom the Register had been shared with was given in that letter. More detailed information as to the publishees is not recorded in the form of an email before one that has survived dated 27 January 2006.

25. On that date, Mr Satterthwaite signing himself as (Health & Safety Co-ordinator (Housing)) wrote to a number of addressees an email with the following subject: "PVP Register Update". The text of the email reads:

> "Attached is the latest PVP register for your information. As this register is Data Protection Act compliant: Please can you:
>
> a) Share this information with staff that may be affected (and our partner organisations).
>
> b) Ensure that any warning markers that have expired (highlighted in yellow) are removed from the persons name if held on separate systems".

26. The printout is in the form of a string or chain of e-mails. One e-mail records that an addressee forwarded the Register on to a further eight addressees, twenty minutes after receiving Mr Satterthwaite's email. He did so under the same subject heading and his text is:

> "Could you please read and pass to any others who you feel would find it useful".

27. Twenty minutes after that, one of the second group of addressees forwarded it to a third group with the text "Delicate information so treat with considerable care in terms of access".

28. These three emails are all dated 27 January 2006. They are printed out together with three further emails dated November 2006. Those in November raised enquiries as to the persons to whom the messages had been passed back in January 2006. The answers are not clear. They are couched in phrases starting "I think I passed it to ….". This is not surprising to anyone accustomed to using e-mails, but it raises questions as to whether the DPA has been complied with.

29. The evidence of Mr Satterthwaite was that the total number of addressees of the Register could not be given, but would not have been over 150. Fortunately the precise number of publishees was not an issue of fact that had to be left to the jury. Mr Tomlinson agreed that the matter could proceed on the basis of that figure.

30. The letter dated 13 December 2005 from Mr Satterthwaite to Ms Clift includes the following:

> "Re – your letter dated 10 December 2005 – PVP Marker
>
> A request for information that you sent to the Council, has been passed to me to answer, as I am the Data Controller for the PVP register.
>
> Under the Management of Health and Safety at Work Regulations (1992), we have a duty of care to ensure that we do not put our employees into situations that may cause them physical or mental harm…
>
> This register is shared between the Council's Health and Safety co-ordinators to distribute on a need to know basis to managers, (especially those services that interface with our customers) so they can take the appropriate actions to protect their staff. This register is also sent to our partner organisations that may provide a service on our behalf (i.e. Slough Accord, Interserve, NHS Primary Care Trust and The Community Safety Partnership). Once the time limit has expired, using the same communication chain, a request is made that all traces of the warning marker is removed from the individual's name.
>
> As long as we write to the individuals stating that they are going on a PVP Register, put them on for a set period, use the same criteria consistently to determine the period and remove all time expired warning, we comply fully with the Data Protection Act 1998. If this criteria is met (which it does), by law we can then share this information without the individual's consent.

> In relation to yourself, you sent a letter to the Council dated 12 August 2005. In it you wrote 'I felt so affronted and so filled with anger that I am certain I would have physically attacked her [Ms Rashid] if she had been anywhere near me'.
>
> On 25th October 2005 you stated in a meeting with our Head of Environmental and Consumer Services that you would physically attack Ms Rashid if you could.
>
> My determination in your case was made as following:
>
> Threatening behaviour 12/08/05 = 1 year on the register re: your letter dated 12 August 2005
>
> Threatening behaviour 25/10/05 (second offence) 3 x 1 = 3 years.
>
> I decided to reduce this period by half, as the first offence had not been communicated to you at the time, (however the second offence did reiterate the first offence) = 18 Months…. ".

31. That letter reflects guidance from two sources. Whether it does so correctly is another matter. The first source is the Policy. This includes what, in another context, would be called sentencing guidelines, listing the activities that may render a person liable to have a violent person marker placed on their file and the "set period" said to be commensurate with the activity. The second document is one issued by the Information Commissioner covering five pages, entitled "Data Protection Act 1998 Compliance advice Violent Warning Markers: used in the public sector" ("the Compliance Advice").

32. Ms Clift pursued her rights of access and sought further information under the Data Protection Act. By a letter dated 11 January 2006 Mr Satterthwaite wrote as follows:

> "Letter dated 18 December 2005
>
> To clarify:
>
> 1. The risk rating is determined by the offence. People that shout and swear would be classified as a low risk, threatening behaviour would be classified as a medium risk, pushing/actual assault would be classified as a high risk, whereby actual bodily harm would be classified as a very high risk.
>
> 2. Suitable arrangements mean that two people must go on visits to your house or attend meetings with yourself. That is the full extent of our arrangements to protect staff under our Violence at Work Policy with someone with a low or medium risk rating. The Council will still provide a full and comprehensive service to the individual.

3. The list provided to you of our partner organisations is exhaustive. Below are details of our relationships with other organisations that provide a service on our behalf, the type of service provided and the reasons for such disclosure to them:

   - Slough Accord

   Environmental Management, including, but not limited to: domestic refuse collection, recycling, grass cutting, road sweeping, drainage problems etc

   - Interserve FM

   Building Maintenance on Council owned properties, estate maintenance.

   - NHS Primary Care Trusts

   Mainly social services related activities – Supporting People, Community Mental Health Team and Community Nursing

   - Community Safety Partnership

   Neighbourhood Wardens

   Disclosure was made to the above organisations as they may all have cause to visit your address, for face to face contact. A good example of this is one of the many satisfaction surveys carried out.

   Letter dated 22nd December 2005

   Re: Data Subject Notice pursuant to Section 10 of the Data Protection Act 1998

   As stated in my letter to you (dated 13th December 2005), Slough Borough Council operate a zero tolerance to aggressive or abusive behaviour. Your letter dated 12/8/05 to the Council clearly states in your own hand 'I felt so affronted and so filled with anger that I am certain that I would physically have attacked her if she had been near me'. In your letter dated 10 December 2005 you state 'I make no apology, neither for my feelings or my actions'

   Therefore, it is felt that you do pose a credible threat. The PVP marker will remain for the duration."

33. Mr Satterthwaite's view of the matter was not, however, quite as firm as the terms of that letter, as sent, might suggest. Before sending the letter he had sent a draft to Mr Kelleher. The draft contained an additional paragraph:

> "Notwithstanding this and re-examining the case notes, I have requested that our partner organisations (as listed above) remove with immediate effect any PVP markers that they hold against your name, therefore your PVP marker will only now remain within the confines of the Council".

34. Mr Kelleher's comment on the draft included the following:

> "… you state that you've reviewed the case notes and now propose to ask our partner organisations to remove the PVP markers with immediate effect. Why have you decided to take this action? ... she is likely to want an explanation as to why it was recommended in the first place, and may only complain further on this particular issue!
>
> Was it the right decision in the first place, if so, why change our position now?"

35. In evidence in chief Mr Satterthwaite explained why he had changed his mind about removing the marker from partner organisation files. He gave two answers. One was that with hindsight he decided that it was not appropriate to include Ms Clift's name on a list sent to two of the partner organisations namely Interserve (because Ms Clift does not live in Council property) and Slough Accord. But that created an administrative problem. The system was not set up so as conveniently to send the Register to two out of the four partner organisations and not the other two. He thought if he did that he might lose control of the Register and there could be confusion in the future. It was better to let it remain as it was. It was an administrative problem.

36. It was clear that the circulation of the Register, insofar as it concerned Ms Clift, was a matter which had presented difficulties for Mr Satterthwaite. Ms Clift's case was not like other cases of individuals that were on the register. He referred to it as unique. In evidence he said the Council "eats and breathes" DPA. "There are consequences when things go wrong. I removed Ms Clift's name 18 months after. I could not wait to do it".

37. On 12 May 2006 Mr Kelleher learnt that Ms Clift was hand delivering letters and he sent an e-mail saying that

> "Under no circumstances should she be allowed into the office, and officers receiving her at the door should be accompanied at all times".

MY RULING

38. I heard argument in the absence of the jury on the sixth day of the trial in the morning. In the afternoon I distributed my ruling in writing without reasons. In relation to qualified privilege I wrote:

"I have decided that for both the e-mail and the Register:

1. [The Defendants] have a qualified privilege defence in relation to publication to employees of the Council who were 'customer facing staff' (and their managers) being employees in the following departments: Trading Standards, Neighbourhood Enforcement and Community Safety.

2. [The Defendants] do not have a qualified privilege defence in relation to publication to employees of the Council who were 'customer facing staff' (nor their managers), being employees in the following departments: Licencing, Food and Safety, Children and Education Services.

3. [The Defendants] do not have a qualified privilege defence in relation to Community Wardens, Trade Union Officials, anyone in the four partner organisations".

39. There were a number of other publishees, as to whom I sought the further assistance of counsel before deciding whether publication to them was on an occasion of qualified privilege or not. Mr Tomlinson listed them as follows:

1) "Environment Health Officers…..[three are named] and … Head of Environmental Services and Policy

2) … Head of Customer Services Team

3) Housing Neighbourhood Managers and supervisors

4) … Strategic Director for Social Services

5) [a name is given but no job description]

6) An unascertained number of additional publishees- Mr Satterthwaite's evidence was that he did not know how many but he thought not over 150 people".

40. The Council submitted that the time that would be spent on submissions in relation to publication to those listed in those paragraphs (with the exception of those covered by paragraph 1 of my ruling) would not be proportionate to the outcome. Mr Beggs accepted that the case should proceed on the footing that publication to those people was not on an occasion of qualified privilege for the same reasons as I would give in relation to other publishees.

41. It should not be assumed that that is the ruling that I would have reached had time been spent in argument. It is possible that, had this agreement not been reached, there might have been issues of fact as to what gave rise to any interests of these publishees. If there had been such issues, further questions would have arisen as to how they were to be resolved, as between the jury and myself. In the event counsel

were properly anxious to avoid any such complication. All issues relating to qualified privilege were agreed to be for me to decide. Thus there would be no risk of a subsequent issue arising as to whether the decision had been properly left to, or withdrawn from, the jury.

42. After further submissions on the questions to be asked of the jury counsel agreed that I should direct them as follows:

> "If you assess damages, then you take into account circulation to 30 people for the e-mail and 150 for the Register. You leave out of account the remainder of the 66 to whom the e-mail was addressed unless you answer question 2 yes [in other words unless they find malice].
>
> If you answer yes to question 2, you take into account all 66 people to whom the e-mail was sent and 150 for the Register".

THE DATA PROTECTION ACT AND THE HUMAN RIGHTS ACT

43. The first proceedings brought by Ms Clift were in the County Court under the DPA. She commenced those proceedings on 13 January 2006 alleging that the Register was inaccurate. Those proceedings have been stayed to await the outcome of this libel action.

44. Ms Clift did not have the benefit of formal legal advice or representation between September 2007 and June 2009, a few days before the start of this trial.

45. The statements of case in the libel action did not include any reference to HRA or DPA. At a pre-trial review on 11 June, that is on the penultimate working day before the start of the trial, Mr Tomlinson had just been instructed. He indicated that Ms Clift would seek permission to amend the statements of case in two respects. The first proposed amendment was to the Particulars of Claim to seek remedies under HRA. He also said he proposed to ask for permission to Amend the Reply. He referred to two decisions, *W v. Westminster City Council* [2005] EWHC 105(QB) and *Wood v Chief Constable of West Midlands* [2003] EWHC 2971 (QB) ; [2004] EMLR 17 at first instance and, in the Court of Appeal, at [2004] EWCA Civ 1638;[2005] EMLR 20.

46. After consideration the Defendants did not object to the proposed amendments to the Reply. I gave permission during the course of the trial. So far as material, the Re-Amended Reply reads as follows:

> "5 It is denied that the e-mail and the Register entry were published on an occasion of qualified privilege… Ms Clift will rely on the following:
>
> 5.1 The First Defendant is a public authority within the meaning of Section 6 of the Human Rights Act 1998 and bound to act in a way compatible with Ms Clift's rights under the European Convention on Human Rights.

> 5.2 It is unlawful for the First Defendant to publish information relating to Ms Clift which interferes with her rights under Article 8 unless the publication of such information is in accordance with law and is necessary in a democratic society for a legitimate aim such as protection of the rights of others.
>
> 5.3 The publication of the e-mail and the Register was not necessary or proportionate to the legitimate aim of protecting the rights of the First Defendant's employees and the First Defendant was not under a duty to publish either of them. In support of this contention Ms Clift will rely on the following:
>
> (a) The widespread publication of information that a person is 'violent' and their inclusion on a register of 'violent persons' is a serious interference with that persons Article 8 rights which requires cogent justification.
>
> (b) Ms Clift had never used violence towards the First Defendant's employees and had never threatened any such employee with violence. No employee had complained about Ms Clift's conduct and no contemporaneous 'Violent Incident Report' relating to Ms Clift had been completed by any person.
>
> (c) There were no reasonable grounds for believing that in the light of the three matters relied on by the Second Defendant in his decision to place Ms Clift on the Violent Persons Register was that it was necessary to publish the e-mail or the Register entry in order to protect employees of the First Defendant and others from violence threatened or perpetrated by Ms Clift. The matters relied on all related to one conversation on 11 August 2005. There had been no further incidents or statements of the same kind and no suggestion that such statements would be repeated or that any employee of the First Defendant was under any threat.
>
> 5.4 Accordingly, the e-mail and the Register entry were not published on the occasion of qualified privilege".

47. There followed a plea of malice which is summarised in para 2 above. The plea of publication set out the facts I have already recited in relation to the circulation of the e-mail with the Register as an attachment on 27 January 2006. The next paragraph material to be cited reads as follows:

> "10 The Register entry and the e-mail were distributed excessively widely to persons and bodies with whom [Ms Clift] had no contact and had no interest in [Ms Clift]. In particular, the Register was sent to Interserve FM which engages in maintenance of council properties. [Ms Clift] does not live in and never has lived in a Council owned property. [Ms Clift] has no contact with Community Wardens: Community Mental Health; a National Probation Service; Child Protection Service;

> Youth Offenders Team; Drugs Action Team; Slough Race Equality Council; People First or Connections Berkshire. The Defendants were under no duty to send the Register Entry to any of the foregoing. None of the foregoing had or were likely to have any contact with Ms Clift at all. Accordingly, they had no interest in receiving the Register Entry such as to give rise to an occasion of privilege".

48. There was no dispute at trial as to the matters pleaded in the second, third and fourth sentences of that paragraph 10.

49. On 11 June Mr Tomlinson had put before the court a draft of an amendment to the Particulars of Claim. When I made my ruling he had not yet formally made an application for permission (and in the event he did not do so). When he submitted the draft I indicated that if permission were granted, then given the nature of the new plea, and the very late stage at which it was being introduced in an action to be tried by a jury, an appropriate direction might be that the issues which it raised should be tried by judge alone, namely myself at a convenient time as soon as possible after the trial of the existing issues between the parties. I also expressed concern at the introduction of a third cause of action under the HRA being introduced in addition to the DPA claim in the County Court and the libel claim in the High Court.

50. Nevertheless, it is appropriate to set out the terms of the draft amendment as follows:

> "12A Further by publishing the e-mail and the Register Entry the [Council] has interfered with [Ms Clift]'s rights under Article 8 (1) of the European Convention on Human Rights without such interference being justified under Article 8 (2) and as a result its actions were unlawful under Section 6 of the Human Rights Act 1998.
>
> Particulars
>
> (1) The [Council] knew or ought to have known that [Ms Clift]'s Article 8 rights would have been interfered with by the publication of the E-mail and the Register Entry that such infringement would injure [Ms Clift]'s reputation, would cause her distress and embarrassment.
>
> (2) The [Council] nevertheless failed to take any reasonable steps to avoid this interference and, in particular, steps to ascertain whether or not [Ms Clift] did, in fact, present any risk of violence. Instead, the [Council] (by [Mr Kelleher]) sent by the e-mail and placed by [Ms Clift]'s name on the Violent Persons Register in circumstances which it knew or ought to have known [Ms Clift] was not a violent or potentially violent person.

> (3) Further, the absence of any violence or threat of violence on the part of [Ms Clift] having been drawn to the [Council]'s attention by [Ms Clift]'s letter dated 10 December 2005, the [Council] failed to take any steps to remove the Register Entry but instead sought to defend the continuing interference with [Ms Clift]'s Article 8 rights in circumstances which such interference was neither necessary nor proportionate. [Ms Clift] will rely on the matters pleaded [in the paragraphs relating to malice]".

51. The DPA represents the implementation by the United Kingdom of Directive 95/46/EC [1995] OJ L 281/31. The recital to that Directive contains a number of references to Article 8 of the Convention. It is plain that it is the purpose of the Directive to ensure the approximation of the laws of member states in implementing the requirements of Article 8, insofar as Article 8 requires, as it does, that the processing of personal data be in accordance with the right set out in Article 8. The Directive and the DPA both preceded in time the passing of the HRA and its subsequent implementation in 2000.

52. It is a notable feature of the Directive and the DPA that they draw no distinction between public authorities and others. Thus an action can be brought against any defendant pursuant to the DPA in respect of data to which that Act applies. On the other hand, an action pursuant to HRA ss.6 and 7 can be brought only against a public authority. Mr Tomlinson's pleadings relate only to Article 8. If the application for permission to amend had proceeded, it would have been necessary to consider to what extent if at all, the duties of a public authority pursuant to Article 8, in particular the duties of the Council in this case, differ from the duties that are imposed by the DPA, in so far as those are material either to the County Court proceedings, or insofar as may be relevant to a defence of qualified privilege in libel.

CASE LAW

53. This is not the first occasion upon which there has come before the courts the question of the relationship between the common law defence of qualified privilege to libel, and the duties imposed by public law, including HRA. The first occasion was the decision of the Court of Appeal in *Wood v. Chief Constable of the West Midlands Police*, referred to above. As May LJ noted at para 65, the disclosure by the police of information in that case had occurred before the coming into force of HRA and DPA. The relevant public law on the disclosure by public authorities of personal information was taken from the decision of the Court in *R v. Chief Constable of North Wales Police, ex parte Thorpe* [1999] QB 396. In *Wood* the Court of Appeal upheld a decision of my own made in a trial with a jury. Applying the principles in *Thorpe*, I had ruled that a defence of qualified privilege had not been made out. The defendant had had no duty to make the disclosure sued upon as a libel by Mr Wood.

54. In *Wood* May LJ said this:

"**[57]** Mr Garnier submitted that the judge was wrong (or confused) (a) to regard the Defendant exclusively as a public authority, and (b) to rely on the case of *Thorpe* as circumscribing a duty of disclosure integral to a plea of qualified privilege. As I understand it, the bones of these related submissions were as follows. Although the law relating to qualified privilege is rooted in public policy, it is essentially a private law defence available as much to Mr Mulligan personally as to the Chief Constable in his public capacity. *Thorpe* is a public law decision in which a policy as to disclosure of sensitive and damaging information which was true was called in question. The public law duty of the police deriving from such considerations is misapplied to the essentially personal question whether Mr Mulligan, an individual police officer with a job to do, had a sufficient personal duty or interest to publish defamatory information which in part turned out to be untrue. If Mr Mulligan did not make sufficient enquiries before publishing the information, that was relevant, not to the question whether the publications were on occasions of qualified privilege, but to malice, and possibly, if malice were established, to exemplary damages.

[58] I do not accept these submissions. First, Mr Mulligan was at all times acting, not as a private individual, but as a police officer. His duties were the public duties of a police officer, acting on behalf of the Chief Constable, the Defendant in these proceedings. The question is whether the Chief Constable, acting through his subordinate, had a sufficient duty or interest to publish the defamatory letters. It does not help in a search for that duty or interest to characterise the defence of qualified privilege as a private law defence. Second, *Thorpe* was indeed a judicial review application which questioned a police policy of disclosure of information of the kind under consideration in that case. But the extent and limits of a police duty of disclosure in the circumstances of that case illuminate, without necessarily defining, the extent and limits of their duty of disclosure in other circumstances. As Lord Bingham CJ said in *Thorpe* in the passage at p 409-410 which I have quoted, the police, as a public body, ought not generally to disclose information which comes into their possession relating to a member of the public, being information not generally available and potentially damaging to that member of the public, except for the purpose of and to the extent necessary for the performance of their public duty. The principle rests on a fundamental rule of good public administration which the law must recognise. The principle does not by definition inhibit the police in the performance of their public duties, including that of detecting and preventing crime and of protecting, so far as reasonably possible, those who may become the victims of

> crime. The principle is directly relevant to the question whether the Chief Constable in the present case had a sufficient duty or interest to publish the material defamatory of VSG and Mr Wood to sustain a plea of qualified privilege. The existence of, and limitations upon, a duty of disclosure do not in the present context turn on whether the information is true or untrue. The question is whether the occasions of publication were privileged. That said, a decision to publish information which may be untrue may well call for even greater care than a decision to publish information which is known to be true."

55. The next case in which this question came before the court is the *Westminster City Council* case referred to above. Before turning to that case it is necessary to mention the decision of the Court of Appeal in *Kearns v. General Counsel of the Bar* [2003] EWCA Civ 331;[2003] 1 WLR 1357 and in particular to the judgment of Simon Brown LJ (as he then was) at paras 23 to 27. For present purposes it is sufficient to summarise that judgment. I gratefully adopt the summary of May LJ in *Wood* as follows:

> "53, The judgment of Simon Brown LJ in *Kearns* contains, as I have said, a valuable collection of orthodox authority on qualified privilege. The defendants had published to members of the Bar unverified mistaken information received from a member of the Bar to the effect that the claimants were not solicitors and entitled to instruct counsel. It was held that there was an established relationship between the defendants and the Bar which required the flow of free and frank communication between them on all questions relevant to the discharge of the defendants' functions. The occasion of the communication was protected by qualified privilege, even though no steps had been taken to verify the communication. As Simon Brown LJ said at the beginning of his judgment, the question raised by the appeal was when is verification a relevant circumstance in determining whether or not a defamatory communication is protected by qualified privilege. The answer turned on the fact that the defendants' publication was made in the context of a recognised existing relationship and a common and corresponding interest in the subject matter of the publication – see paragraphs 21, 34, 39 and 41 of Simon Brown LJ's judgment. Simon Brown LJ substantially adopted relevant analyses of Eady J in *Kearns* itself and in *Komarek v Ramco Energy plc* [2002] EWHC 2501 (QB). These are quoted in paragraphs 38 and 40 of Simon Brown LJ's judgment, to the effect that, where there is such a recognised existing relationship, the issue is not fact sensitive in the sense that it would become necessary, as it had been in *Stuart v Bell* [1891] 2 QB 341, to investigate the particular circumstances surrounding each individual publication.
> 54. Interesting and helpful as *Kearns* is, Mr Garnier accepted that there was no recognised existing relationship between the

> Chief Constable and the recipients of Mr Mulligan's letters or the insurance world generally. The defence of qualified privilege in the present case turned on an orthodox analysis of duties and interests and might be fact sensitive.

56. In *Westminster City Council* the words complained of had been published in a Report for Review Child Protection Case Conference to be held pursuant to the duties imposed on local authorities by the Children Act. The two individual employees of the defendant council responsible for the publication admitted that it should not have happened and that the explanation was a mistake and a misunderstanding on their part. In that sense it was not suggested that there was any duty to publish. I upheld the submission that the occasion was nevertheless one of qualified privilege, on the footing that I was bound to do so by the decision of the Court of Appeal in *Kearns*. The reasons I gave were as follows:

> "148. The Court in *Kearns* was concerned with information which was unverified, not with information which was irrelevant for any other reason. The situation in the present case is similar in this respect. The submission for the Claimant is that the words complained of were irrelevant because they were unverified. It is only 'evidence based' information (in the words of the statutory guidance), so he submits, that is relevant.
> 149. This is a case of an existing and established relationship, going back many years, between the mother's family and the Social Services Department of the Council. Accordingly, *Kearns* supports the following conclusion. The fact that the information in the words complained of was not verified (or not 'evidence based') could not take the case outside the protection of qualified privilege unless Ms Marks and Mr Thomas were deliberately publishing what they knew to be outside the official guidance known to them.
> 150. It is true that the duties of the Council in this case (which were being performed on their behalf by Ms Marks and Mr Thomas) were public law duties imposed upon them by the Children Act. It follows that the statute and the guidelines are to be looked at. If the words complained of are published to person to whom there is not duty to publish, or at a time, or in other circumstances when there is no duty to publish, the consequences of that do call for consideration.
> 151. However, in my judgment what matters is that the relationship between the Defendants and the publishees was an established one which plainly requires the flow of free and frank communications in both directions on all questions relevant to the discharge of the Council's functions. …".

57. However, in that case there was a separate claim under HRA ss.6-8. I concluded at para 239 that the disclosure was an interference with the claimant's right under Article 8 in that the information was highly sensitive and potentially very damaging to him. There was no need to make the disclosure. I made a declaration accordingly at para 253, but I concluded that an award of damages was unnecessary.

58. The third occasion upon which the question came before the court was in *W v JH and Another* [2008] EWHC 399 (QB), another decision of my own. In that case the claimant had some time in the past been an employee of the defendant council. A complaint had been made about his conduct in 1993 and 1994. A disciplinary hearing had been held and the claimant was issued with a final warning to be placed on his file. The notification letter stated that this would be reviewed for removal after a period of 18 months. The claimant left employment with the defendant and some 10 years later, in 2005, found work with a university. A current employee of the council, acting on her own initiative, but happening to know of the complaints that had been made in 1994 and 1995 against the claimant, notified the university about them. The claimant sued and the defence was qualified privilege. The application that came before me was for summary judgment to CPR Part 24. I dismissed the application having heard submissions advanced for the claimant similar to those advanced now by Mr Tomlinson.

SUBMISSIONS

59. Mr Beggs submitted that I ought to take exactly the same course in the present case as I did at para 151 of the *Westminster* case. Mr Tomlinson submitted that I was in error in taking that course in the *Westminster* case.

60. In support of the defence of qualified privilege Mr Beggs submitted that the relationship between the Council and Mr Kelleher and the addressees of the email, who were also officers or employees of the Council, was a communication between parties in an "existing relationship" of the kind referred to in *Kearns.* In consequence, as matter of law, the issue of whether or not there was a duty to make the communication was not fact sensitive. It would not be necessary to investigate the particular circumstances surrounding the publication.

61. The submission that there was an existing relationship with publishees who were employees of the Council was uncontroversial. But Mr Beggs also submitted that there was no meaningful distinction to be drawn between the recipients who were employees of the council and those who were officers or employees of the four partner organisations. As he put it:

> "They all shared the common interest of having the public facing staff who might come into contact with the Claimant. 'Might' is a sufficient threshold for otherwise the use of the Register becomes operationally impossible".

62. This submission seems to me to be much more controversial I consider below (para 99 ff)what my conclusion would have been if I had applied the common law test without reference to HRA.

63. Mr Beggs maintained the submission that I should apply *Kearns,* as I did in the *Westminster City Council* at para 151. But he did not put this submission at the forefront of his arguments. Rather, he put at the forefront of his arguments submissions to the effect that the Council had complied with Article 8. That is, he submitted that on the facts, most of which were documented and undisputed, the Defendants did have a duty to circulate the e-mail and the Register as they did. In summary, the distribution was in accordance with law (namely health and safety

legislation and the DPA), and both necessary and proportionate for the protection of the rights and freedoms of their employees and the employees of their partner organisations.

64. For this purpose, while reserving his position as to whether there is an Article 8 right to reputation, Mr Beggs accepted that the placing of the Claimant on the Register engaged her Article 8 rights in the narrow context of her reputation; and that the publication had to be justified under Article 8 (2). He submitted that the protection of the safety of the Council's employees and those of its partner organisations was a "legitimate aim" sufficiently important to justify an interference with the Claimant's Article 8 rights; that the inclusion of a person's name on the Register is rationally connected to that legitimate aim; and that the measures taken to achieve the legitimate aim were proportionate and struck a fair balance between the interests of the Claimant and that of the community.

65. For his part Mr Tomlinson accepted the submissions that there was a legitimate aim and that inclusion of a person's name in the Register was rationally connected to that. The issue was on the questions of proportionality and fairness, both generally and, in particular, in relation to the partner organisation.

66. It is understandable that Mr Beggs should have ordered his arguments as he did. The Council has policies on both health and safety, and on data protection. Mr Kelleher and Mr Satterthwaite made the decisions they did make after considering these policies. Mr Satterthwaite directed himself on the law of health and safety at work, and on data protection, as set out in the Policy and the Compliance Advice. He did not mention the law of libel. Whether or not Mr Satterthwaite directed himself correctly is an issue for the court. But it is understandable that the Defendants should wish to be judged by the law which they understood to be applicable. Mr Beggs may also have taken the view that the course I adopted in the *Westminster* case at para 151 would be difficult to support. If so, he did not say that.

67. By the time of the publication which was the subject of *Kearns*, both DPA and HRA were in force. But no mention is made of either Act in the judgments. This is not surprising. The information the subject of the warning letter issued by the Bar Council was the (inaccurate) statement that the Claimants were not solicitors. *Kearns* is an example of common law qualified privilege which does not relate to sensitive information, and reputation had not yet been recognised as an Article 8 right. There are a number of "existing relationships" which involve business information, such as information as to a person's credit. But the greater number of cases relate to information of a personal nature. Much of it would qualify as "sensitive" within s.3 of the DPA. Examples are information about the commission, or alleged commission, of an offence, and information about a person's physical or mental health. There are a number of examples of such information on the Register in this case. *Wood* would now be an example of such a case. The information there in question related to the alleged commission of an offence.

68. I therefore conclude that if there is a conflict between the decisions of the Court of Appeal in *Wood* and in *Kearns*, then I am bound to follow *Wood*. I do not see that there is a conflict between these two authorities, because in *Kearns* the defendant was not a public authority, and public law did not apply. Mr Tomlinson is therefore right to say that I was in error in this respect in *Westminster* at para 151. Mr Tomlinson

does not suggest that the error would have affected the outcome of that case. I went on to consider and uphold the claimant claims under the HRA. But if it did affect the result (and I say nothing about that), then the effect would be limited to the remedy. In libel the claimant would have been entitled to some award of damages, however small, whereas that is not the case for claims under the HRA.

69. It follows that where determination is required of a conflict between the rights (under the HRA and Article 8) of the subject of a reference or warning, and the rights of those to whom the reference or warning is to be addressed, then consideration is now required as to the approach to be adopted.

70. Mr Tomlinson submitted that in order to be justified under Article 8(2), the publication must be necessary for a legitimate aim and must be proportionate to that aim. He cited *Huang v Home Secretary* [2007] 2 AC 167, para 19. In his words:

> (i) the legitimate aim in question must be sufficiently important to justify the interference;
>
> (ii) the measures taken to achieve the legitimate aim must be rationally connected to it; and
>
> (iii) the means used to impair the right must be no more than is necessary to accomplish the objective;
>
> (iv) a fair balance must be struck between the rights of the individual and the interests of the community, which requires a careful assessment of the severity and consequences of the interference.

71. Although Mr Beggs reserved the point, it is established that reputation is a right under Art 8: see *Cumpana v Romania* (2005) 41 EHRR 200, para 91 and subsequent Strasbourg case law; *Greene v. Associated Newspapers Ltd* [2004] EWCA Civ 1462; [2005] 1 QB 993 para 68. Mt Tomlinson submitted that other Article 8 rights of the Claimant were engaged, namely her relationships with others and the conduct of her normal private life. I express no view on that submission. This is a libel action the purpose of which is to vindicate her reputation. Any other rights that might be engaged may be addressed in the DPA proceedings or in proceedings under HR Ass.6-7.

72. Physical and psychological integrity may also be included in Art 8, at least where there is a real risk of physical assault: *X and Y v Netherlands* (1985) 8 EHRR 235. So for some entries on the Potentially Violent Persons Register, the rights of the publishees, or of other employees, may in some cases be rights under Art 8. Mr Beggs began his closing speech by inviting the jury to consider a hypothetical case in which a complainant used the words used by Ms Clift and then went on to assault and kill a council employee.

73. Where that is a real risk, the employees' rights under Article 8 may be engaged. Then the approach of the court will be as set out in *Re S (A Child) (Identification Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593 at [17]. In that case the House of Lords was considering rights under Art 8 and 10. But the same must

apply to two persons' conflicting rights under Article 8, one person's right to physical integrity and the other person's right to reputation. Lord Steyn said:

> "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 justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

74. In other cases, most notably in employee reference cases, the rights of the publishees of the warning or reference will not be engaged. In such cases the Art 8 rights of the subject must be expected to prevail.

75. Mr Beggs submitted that the Council owed a duty to ensure the safety of their staff. He cited Health and Safety at Work Act 1974 ss.2 and 3 and the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242), in particular regulations 3-5 and Schedule 1. He also cited the Compliance Advice. He did not submit that these duties were owed equally by the Council to the staff of its partner organisations, such as the NHS, nor could he have done so. Nor did he submit that the risk to the Council's own employees on the facts of the present case was such as to engage their Articlr 8 right to their physical and psychological integrity. Nor could he sensibly have done so.

76. Mr Beggs further submitted that the protection of the safety of its staff is an essential function of the Council if it is efficiently to carry out its numerous other statutory functions. This was not in dispute. But again it is to be noted that no Convention rights of Mr Kelleher were engaged, and as a public authority, the Council has no Convention rights.

77. Accordingly the only Convention right engaged in this libel action is that of the Claimant to her reputation.

78. I therefore turn to consider whether the circulation of the information in the e-mail was necessary and proportionate for the protection of the rights of the employees of the Council and the partner organisations.

79. Mr Tomlinson accepted that the Council acted with a legitimate aim and that some circulation of the Register and the e-mail represented measures which are rationally connected to that aim. His submission is that the circulation was greater than required to accomplish this objective and that a fair balance was not struck.

80. One question that arises is the relevance of Me Kelleher's state of mind to the question that I have to decide. Mr Beggs submitted that Mr Kelleher could not be criticised for the extent of the circulation. Given that if he honestly believed the risk posed, he would have been neglectful not to have warned those he managed. But he accepted that this was a question for the jury. Mr Tomlinson submits that the factual material available to the decision maker must be considered, but there may still be a duty to publish information that is or may be false. He submits that the Court looks at

the underlying facts in order to determine whether the statements made were objectively justified so as to require the protection of qualified privilege, see *Downtex v Flatley* [2003] EWCA Civ 1282, paras 47-48.

81. Mr Tomlinson submitted the following:

(i) There was no evidence of any the risk to the safety of the generality of the Council's employees: put at its highest the evidence only showed a risk to Ms Rashid.

(ii) The "threats" directed towards Ms Rashid which were relied on had not been made to her directly and not been accompanied by actual or directly threatened violence. There was no evidence that the Ms Clift had contacted or attempted to contact Ms Rashid at any time between 11 August and 30 November 2005 or had in any way sought to give effect to her alleged "threats".

(iii) The evidence showed that, in substance, the only matter relied on was what is alleged to have been said to Mr Kelleher on 25 October 2005. Even taking the Defendants' evidence at its highest this did not constitute (and was not taken to constitute) a threat which was sufficiently serious or immediate to justify a Violent Incident Report or any kind of immediate "protective measures".

(iv) If the Council's duty to protect the safety of its staff required it to take measures to protect Ms Rashid from Ms Clift then the proportionate way to do this (involving the least interference with Ms Clift's Article 8 rights) was to put in place measures focussed on that employee – for example, ensuring that Ms Rashid did not come into contact with Ms Clift, circulating appropriate, accurate and specific warnings concerning Ms Clift and Ms Rashid to relevant employees.

(v) If (contrary to Ms Clift's primary submission) it is accept that there was a duty to protect all "customer facing staff" from potential violence by Ms Clift by circulating a general warning that she had been added to the violent persons register, then it is accepted that publication of the Email to the members of the trading standards, neighbourhood enforcement and community safety teams and to the relevant managers was an occasion of qualified privilege.

(vi) There cannot have been a duty to circulate to all staff in the Licensing Team, Food and Safety or to the Community Wardens. There was no evidence that any of these staff were likely to come into contact with the Claimant. In the unlikely event that they did then the managers could take appropriate steps to deal with the position. Put another way, contrary to the Compliance Advice, these employees were not "likely to come into physical contact with the Claimant" and a "need to know" could not otherwise be demonstrated. The Register was forwarded to trade union representatives, but they did not need to know the identity of those put on the Register. Mr Satterthwaite's evidence is that it was sent to them to show that the First Defendant was "doing something". The Register was also forwarded to employees in the Children and Educational Services department, and there was no duty to publish to these people for the same reason. Mr Satterthwaite accepted that the Claimant had no dealings with them.

(vii) In addition, the Register Entry was sent to Slough Accord, Interserve FM, the NHS Primary Care Trust and the Community Safety Partnership (which included about 50 businesses in the Town Centre Business Initiative). Mr Satterthwaite accepted in cross-examination that there was no need to send the

Register to Slough Accord and Interserve. The Register was circulated to these bodies for administrative convenience – because he might not have remembered that he had removed her in two months time when he updated and redistributed the Register. As to the NHS Primary Health Care Trust, Mr Satterthwaite accepted that there was no credible evidence that the Claimant would attack these employees. As to the Community Safety Partnership there was no evidence that the Claimant was likely to come into contact with any part of these bodies or that she presented any risk to them.

(viii) The information on the Register Entry was, on the Defendants own case, substantially inaccurate – in that the threats were not "via correspondence," there was not "threatening behaviour on several occasions" and the incident did not take place on 30 November 2005. The assignment of the "risk" level at Medium was difficult to understand and the calculation of the 18 month period (which suggested that the "offence" was a serious one) was ad hoc and not rationally justifiable.

(ix) The Register Entry was published to 82 people by Mr Satterthwaite was then forwarded by its recipients to various other individuals. There is no record of the names of all these individuals.

82. Mr Beggs submitted the following. Objectively it would not be unreasonable for Mr Kelleher and Mr Satterthwaite to consider that some risk existed to Ms Rashid, and that if there was a risk to her then there may also be a risk to others of the Council staff. There is a danger of the court imposing its views on the facts. The views of senior officers of the Council should be accorded respect, since it was they who have responsibility for the welfare of the Council's employees and know the situation "on the ground" better than the court could possibly do. There is no suggestion that Mr Satterthwaite was other than honest. The court should not set such a complicated or high bar as to work against the public interest that the privilege is intended to protect. It was a rational policy to send the Register to senior managers within the Council and within partnership organisations and to leave them to determine which, if any, of the names required onward circulation and to whom. The inclusion of a person's name on the Register meant no more than that staff would attend the Claimant in pairs and make proper records of conversations with her.

83. I have set out above (para 38 above) the conclusions that I reached. Publication to those in para 1 of my ruling was rational and proportionate, ie publication to employees of the Council who were 'customer facing staff' (and their managers) being employees in the following departments: Trading Standards, Neighbourhood Enforcement and Community Safety. Publications to other employees were not proportionate or fair.

84. It was my judgment that a reasonable person in the positions of Mr Kelleher and Mr Satterthwaite could conclude that what the Claimant had written and said on 12 August (and, on her evidence, repeated on 25 October) did give rise to a risk that she might be understood by staff as making threats. The fact that she had not said what she did directly to Ms Rashid, or to any staff from whom she was requesting a service, does not of itself preclude such a risk. There is force in Mr Beggs' submission that the court should respect the judgment of the officers of the Council whose duty it was to make the relevant decision. In particular, in this case, Mr Satterthwaite was an experienced officer and a candid witness, whose good faith was not in question. The

fact that the Violent Incident Report Form was not completed promptly is a matter relevant only to malice. If the view reached by the two officers was objectively reasonable, the fact that they may have reached it late does not mean that they did not have duty to communicate with the Council's employees.

85. But I do not accept that it was reasonable to conclude that any risk existed to those of the Council's staff who worked in departments which the Claimant was not likely to approach, such as Licensing. Trade union officials did not need to see the names of those on the Register in order to verify that the Council was taking appropriate measures to protect union members. Anonymising the version of the Register sent to them would be a simple and proportionate measure.

86. In my judgment the Council owed no duty to the staff of partner organisations which it did not owe to the staff of any other body, public or private, from which the Claimant might seek services or supplies. And in the case of two of those organisations, Mr Satterthwaite correctly conceded that there was no evidence of risk. Administrative convenience of the kind he advanced could not be a sufficient reason for sending the register to such organisations. Notably weak was the explanation given by Mr Satterthwaite to Ms Clift in his letter of 11 January 2006 of how staff of the partner organisations might come face to face with Ms Clift: "A good example of this is one of the many satisfaction surveys carried out".

87. The implication that two members of staff might be required to attend upon a person seeking the Council's services is not as harmless as the requirement that a note be taken of conversations. There is a limit to the number of staff the Council can deploy, and the number of staff will not always suffice to give an appropriate response to a member of the public. If two members of staff must be assembled to meet a person on the Register, then there may be much greater delays than would otherwise be the case. Such a requirement may be humiliating. The consequences of these measures were illustrated when Mr Kelleher learnt that Ms Clift was hand delivering letters and sent the e-mail of 26 May 2006: even to deliver a letter, she was not be allowed onto the Council premises unless accompanied by two officers.

88. Two points advanced by Mr Tomlinson I reject as irrelevant: the inaccuracies or errors in the Register and the fact that there is no proper system in place for monitoring to whom the Register was ultimately forwarded. Both these matters might well constitute breaches of the DPA or the HRA for which remedies outside a libel action might lie. I make no judgment about that.

89. For the purposes of qualified privilege in libel, the inaccuracies are irrelevant because they are not in my judgment capable of adding to the injury to the Claimant's reputation. This is one aspect of Article 8 which Mr Tomlinson invokes in this case. The same applies to the submission that the risk rating of Medium was too high and the 18 month period too long. Both of these may arguably be interferences with the Art 8 rights of the Claimant, but in the circumstances of this case they do not in my view arguably increase the injury to her reputation.

90. The absence of a system of monitoring to whom the Register was published means that the Claimant may not be able to prove the full extent of the publication. The onus of proof is upon her, and if she is unable to discharge it, that cannot be relevant to the

defence of qualified privilege that might be available in respect of other publications which she can prove.

91. In reaching my judgment on these matters I have not had regard to the Compliance Advice, even when that was referred to by counsel. As Mr Satterthwaite correctly observed in evidence, although he had regard to it, it is not law. Moreover, Mr Tomlinson had not based his submissions on the DPA, and the Compliance Advice is directed to the DPA. It does not in terms address the requirements of the HRA. This may reflect a view, which Mr Tomlinson suggested was likely to be right, namely that in the field of data protection the requirements of the HRA are no greater than those of the DPA, but that the DPA is more specific.

THE COMPLIANCE ADVICE

92. Having reached the conclusions that I did, I compared them with the Compliance Advice. This is a useful check. Although the Compliance Advice is not law, it comes from the Information Commissioner, and it is carefully reasoned.

93. Paras 6 and 7 of the Compliance Advice note that the health and safety duties of employers come within DPA Sch 2, para 3 and Sch 3 para 2(1) ("compliance with any legal obligation to which the data controller is subject"). But in para 7 it is stated that "This condition is not, however, likely to be applicable where information about an individual (either singly or as part of a sharing of data about potentially violent individuals) is passed to another data controller". A similar view is expressed in more detail in paras 18-22, which refer specifically to the need for decisions to be made on a case by case basis in relation to sensitive information (The Protection (Processing of Sensitive Personal Data) Order 2000 SI No 417 para 1). This advice is similar to the view I have expressed in relation to the sending of the Register to partner organisations.

94. Para 16 provides that:

> "Data controllers should ensure that only those members of staff who are likely to come into physical contact with a potentially violent individual, through visits or by meeting in open plan reception areas, or who can otherwise demonstrate a need to know, have access to violent warning marker information. So for example where a member of staff is required to visit a potentially violent individual, at this point they should be advised of this fact".

95. This advice is more restrictive than the view I formed in relation to publication to the Council's staff. The only evidence of staff being likely to meet Ms Clift was of reception staff to whom she hand delivered the letters she wrote to the Council. No one was likely to visit her at home, other than staff investigating a complaint she might renew about noisy nuisance from neighbours. The letter Mr Kelleher wrote when he learnt she was hand delivering letters (para 87 above) is the kind of specific warning contemplated by the Compliance Advice, even though it went further than may have been justified in the present case.

96. Had Mr Tomlinson made submissions on the DPA, it is possible that I might have adopted the same view as the Information Commissioner, or I might not. It may require consideration in another case.

97. It follows that the views that I did reach do not appear to me to be ones which should cause any greater difficulty than the policies which the Council is in any event applying already, when considering placing a person's name upon the Potentially Violent Persons Register.

98. The Compliance Advice does not assist on the definition of violence or violent behaviour. The Policy gives what it states are "Examples of violent behaviour covered by the Code of Practice". They include: "Shouting, Swearing, Racial / Sexual Abuse, Threats, Pushing, Spitting, Object Thrown, Damage, Hostage and Actual Violence". These are all things which an employee should expect to be protected from. But to refer to them all as examples of violence, or even potential violence, gives an extended definition of that word. It normally connotes at least a threat of physical force, and one which is meant seriously. That may go some way to explain why Mr Satterthwaite referred to Ms Clift's case as unique. Ms Rashid claimed that Ms Clift had shouted. None of the other witnesses interviewed by Mr Kelleher, or who gave evidence at the trial, alleged that Ms Clift had shouted. Ms Clift denied that she shouted, as did Mr Gulfraz. I cannot resolve such an issue of fact, and if the jury reached a view on that, it cannot be deduced from the verdict they gave. If the title of the Register had not included the word "violent", this dispute may not have evolved as it did.

THE IMPLICATIONS OF THIS JUDGMENT

99. The ruling I made would have been different if I had followed *Kearns*. So far as publication to fellow Council employees is concerned, there was an existing relationship, and so no occasion to enquire into the circumstances. Publication to all employees of the Council would have been on an occasion of qualified privilege, including to those employees who did not need to know, such as those in the Licensing Department. In the case of publication to partner organisations, or non-employees, these were not with in an existing relationship, and the ruling would have been the same. These were not on an occasion of qualified privilege.

100. In *Kearns* not all the recipients of the information provided by the Bar Council were likely to need to know it. Publication was "To all heads of chambers, all senior clerks/practice managers". It seems unlikely that more than a minority of such publishees were likely to have any communication with Mr Kearns. In so far as the Council's employees, Community Wardens and Trade Union officials (all of whom I take to have been in an existing relationship with the Council) may have been informed of more than they needed to know, then at common law that goes to malice, not to the existence or otherwise of the privilege: *Horrocks v Lowe* at p151E-F below.

101. There are two ways in which a publication can be said to be excessive. It may be excessive in the sense that it is sent to a publishee to whom no duty was owed, or where the necessary reciprocity of interest was absent. Excessive publication in that sense results in the occasion not being one of qualified privilege.

102. The publication may also be excessive in the sense that it incorporates irrelevant information, that is information not necessary for the performance of the particular duty or the protection of the particular interest upon which the privilege is founded. In : *Horrocks v Lowe* at p151E-F Lord Diplock said this on that point:

> "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."

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

104. The conclusions I have reached in this case may have some impact upon defences of qualified privileged raised by defendants who are not public authorities, but who have published information in breach of DPA. I have not so decided. Whether they do or not must remain open for another case. Even if the position of some personal or

private sector defendants is to be assimilated to that of the Council in this case by reason of the DPA, there will remain communications to which the neither the HRA nor the DPA apply. Examples will be reports of crime, and slanders, where the information is published by an individual and has not been recorded in any form to which the DPA applies.

105. The common law response to qualified privilege is set out para 7 of the Re-Amended Reply. At paragraph 8 there is a corresponding plea in relation to the Register. The excessive publication point had been foreshadowed in the Particulars of Claim, at para 13.30, under the head of aggravated damages. As pleaded in the Re-Amended Reply it was based not on human rights law, but on common law libel principles. Mr Tomlinson submitted that the Council had failed to discharge the burden of proving the required reciprocity of duty and interest. A comparison with para 5 shows the difference between responses to the defence of qualified privilege under the common law and under HRA.

106. The common law response to qualified privilege reads as follows:

> "7. Further or alternatively the Defendants abused any occasion of privilege that may be found to have attached to the words complained of in the e-mail. By publishing the e-mail to uninterested persons and/or disseminating the e-mail unnecessarily widely so that such publications did not take place on an occasion of qualified privilege. The Defendants are put to proof that:
>
> 7.1 There was such a duty to send the e-mail to each and every person identified in Schedule 1 of the Particulars of Claim [the 54 named addressees are listed] and that the same had a corresponding interest in receiving it.
>
> 7.2 There was a duty to send the e-mail to the Community Wardens… and that the same had a corresponding interest in receiving it.
>
> 7.3 There was a duty to send the e-mail to each and every additional person if any who received it other than those identified above (the identity of whom are not known to [Ms Clift]) and that the same had a corresponding interest in receiving it.
>
> 7.4 Without prejudice before going, the Defendants are put to proof that each and every person was a person who had contact with Ms Clift or was likely to have contact with Ms Clift in circumstances where that person potentially would be exposed to violence if [Ms Clift] had been a violent person, namely being in [Ms Clift]'s physical presence as opposed to telephone contact or other remote forms of contact".

107. When reaching my decision I also had in mind the reasons why the law should have developed in the way that I have held that it has, some of which I had to consider when reaching my decision in *W v JH*. They include the following.

108. The situation today is very different from that which has applied in the past. There have been recent changes both in business practice and the law. Up to the late 1990s, when officials and employees of large organisations were communicating information about individuals they would have been advised that the most relevant law applicable was the law of libel.

109. Documents are now normally held and communicated electronically. It is easy and common to circulate by e-mail to very large numbers of people, within (and outside) an organisation, information which, in the past, would have been addressed in a letter or memo to very few. It is therefore much more likely than in the past that information will be communicated to persons to whom no duty is owed, or who do not have a legally sufficient interest in receiving the information. It was in order to address this change in practice that the data protection legislation was introduced, first in a limited form in 1984, and then as it is now in DPA. HRA was not specifically targeted at this issue, but it undoubtedly applies to it.

110. Communicating personal information is a normal part of the business of both the public and private sectors. But references about former employees (and others such as prospective lessees), and warnings about individuals presenting risks to employers, employees and others, have always had to be given. The common law on qualified privilege in relation to such matters is generally traced back to *Toogood v Spyring* (1834) 1 CM & R 181, 193. But Mitchell (*The Making of the Modern Law of Defamation* Hart 2005, Ch 7) traces it back to a number of eighteenth century cases and the troubled relationship between masters and servants that existed in that century. One of the earliest cases commonly cited is *Coxhead v Richards* (1846) 2 CB 569 – see *Kearns* paras 23 and 24. That case involved a warning of suspected misconduct of ship's captain communicated to shipowner. It did not involve a risk to the life of those on board, but the court considered what the position might have been if it had. If it had, then today that would be considered as engaging the Article 8 rights, or the right to life, of the crew and any passengers.

111. The law of defamation can be traced back centuries further. Professor Helmholz has traced back the law back to the sixteenth century, and he too considers the historical context in which it developed: see The Oxford History of the Laws of England Vol I, p581. Then, as later, it provided that nothing less than malice would enable a claimant to succeed on occasions which would later be said to be protected by qualified privilege. He wrote:

> "the protection of reputation was 'outweighed' by society's need for reliable references and the advantages of honest communication of opinion….
>
> A certain class bias was undoubtedly present. The modern letter of recommendation written on behalf of students illustrates the continuing validity of this kind of qualified privilege, as does its ambiguous nature".

112. The historical cases show that the values set down in the Convention in 1950 as rights under Articles 8 (including the right to reputation) and Article 10 (including the right of freedom of expression in the giving of references and warnings) were not invented in 1950. These and some other Convention rights can be traced back, not only to the American Bill of Rights and the French Declaration in the eighteenth century, but also to the very beginnings of English law. So one thing that HRA has achieved is to provide a means through which the courts can review the relative priority that the common law gave to those rights (which it already recognised), and adjust those priorities to meet contemporary needs.

113. The common law in the form it had reached up to the mid 1990s had the significant advantage of certainty, at least in those cases where a duty and interest clearly existed. In some cases there were difficulties in deciding whether a duty existed, and these difficulties are reflected in the number of majority decisions in the Court of Appeal, of which an example is *Stuart v Bell* [1891] 2 QB 341 (see *Kearns* para 30). But the important criticism to be made of the common law is more fundamental. There is obvious potential injustice to the person who is the subject of a reference or warning. The law of libel does not provide for declarations of falsity. So, however clear it was that a person had been wrongly defamed, he would generally have no redress.

114. The courts have frankly recognised this. In *Bowen v Hall* (1881) 6 QBD 333, 343 in a passage cited in Gatley at para 14.4:

> "It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. But …. it is not expedient that liberty should be made the cloak of maliciousness".

115. In *Coxhead v Richards* (1846) 2 CB 569 Cresswell J said:

> "It is so manifestly for the advantage of society that that those who are about to employ a servant should be enable to learn what his previous conduct has been, that it may be well deemed the moral duty of the former employer to answer inquiries to the best of his belief".

116. Society has changed since the nineteenth century. If by the word "society" Cresswell J meant those members of society who are about to engage an employee, his statement is understandable. The advantage to those members of society seeking employment is less clear. Today almost every member of society needs a reference to acquire a qualification for work and to obtain employment. These classic statements of the public policy underlying the law of qualified privilege do not apply today. Lord Woolf noted this in *Spring v Spring v Guardian Assurance plc* [1995] 2 AC 296 at p352C-G. He concluded that:

> "public policy comes down firmly in favour of not depriving an employee of a remedy to recover the damages to which he would otherwise be entitled as a result of being a victim of a negligent misstatement".

117. In *Spring* Lord Lowry foreshadowed the approach the courts adopt since HRA by referring to the Convention at p326G, after saying, at p326B-G, that what is required is the balancing of what were then moral arguments, but are now Convention rights:

> "To assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and practical arguments. This exercise could no doubt produce different answers but, for my own part, I come down decisively on the side of the plaintiff.
>
> On the one hand looms the probability, often amounting to a certainty, of damage to the individual, which in some cases will be serious and may indeed be irreparable. The entire future prosperity and happiness of someone who is the subject of a damaging reference which is given carelessly but in perfectly good faith may be irretrievably blighted. Against this prospect is set the possibility that some referees will be deterred from giving frank references or indeed any references."

118. But at that time the law of libel could not provide a remedy. When incorrect information is communicated, carelessness or innocent error is more likely than malice to be the explanation. And even where malice is suspected, the difficulties in proving malice are great (*Horrocks v Lowe* [1975] AC 135, 149-150).

119. In *Spring* the claims had been made in malicious falsehood, breach of contract and negligence, but not (in the light of *Horrocks v Lowe*) in defamation. The House of Lords addressed this defect in the common law of defamation by finding in the common law of negligence a new remedy for injustices in employee reference cases. In *Spring*, as Lord Lowry made clear at p 325, the House of Lords recognised liability for defamation could be extended by dispensing with the need for malice, although that was not a defamation action. The House decided instead to provide a remedy by extending the law of negligence. The House of Lords recognised a duty of care on the part of a former employer to an employee for whom he gives a reference. But it has not been established that the same remedy would be available in cases of warnings about a person who is not an employee or former employee, although the consequences for such a person could be just as serious. It could not be said that in this case the Council owed Ms Clift a duty of care in negligence.

120. The DPA has created new statutory rights which are in no way related to employment or other relationships, although they affect such relationships. That Act requires attention to be focussed on the rights of those who are the subjects of references and warnings, as well as on the rights of those to whom the references and warnings are addressed. Personal data must be processed (which includes disclosed) "fairly and lawfully", and it must be accurate: see Sch I. There are extensive provisions on the interpretation of these and other principles and a number of statutory instruments containing further provisions. I shall not consider these further, because Mr Tomlinson made no submission based upon them. He confined his submissions to the new rights and duties created by the HRA, which apply to the defendant council, but would not apply directly to a private sector employer.

121. In relation to common law qualified privilege Keene LJ said in *Kearns* at para 45: "The need to act responsibly will not arise". He was citing Lord Phillips MR (as he then was) said in *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] QB 783 at [36]:

> "a person giving a reference or reporting crime need not act responsibly: his communication will be privileged subject only to relevance and malice".

122. In cases where the HRA or the DPA apply, that can no longer be said.

123. I have not had to consider generally whether a defendant who could show that he had acted in accordance with the HRA and the DPA, could nevertheless fail to establish that he and the publishees had the duty/interest, or reciprocal interest, relationship that would be required for the publication to be protected by common law qualified privilege. But the converse is not the case. Mr Tomlinson submitted that the publication in the present case was at least in part within an established relationship (so the requirements of the common law may be satisfied), and yet the requirements of the HRA are not satisfied.

124. There is a further observation to be made in relation to the trial by jury of actions involving qualified privilege. This is a libel case to which s.69 of the Supreme Court Act applied. No one suggested, or could have suggested, that it required "prolonged examination of documents" or that there was any other reason why an application for trial by judge alone should have been granted, if it had been made. But I expressed my indebtedness to the parties for their willingness to reach agreement that matters relating to the defence of qualified privilege (other than malice) should be determined by me. In the event I have not consciously determined an issue of fact. But the investigation of the circumstances relevant to the existence of the Council's duties under the HRA could have involved issues either of fact, or of mixed law and fact. The difficulty of correctly apportioning responsibility for such decisions between judge and jury might have been considerable. A wrong attribution can lead to an appeal on the basis that the judge has withdrawn an issue from the jury.

125. That it was possible to resolve these matters without undue inconvenience to the jury was due to the fact that both parties were represented by experienced counsel. This might well not have been the case. Ms Clift acted in person until a few days before the trial. No litigant in person could have been expected to assist the court on the law of qualified privilege and its relationship to the HRA. However, that does not mean that the points raised by Mr Tomlinson would not have had to be considered. Mr Beggs would have drawn the relevant authorities to the attention of the court, in accordance with counsel's duty to the court, and I might myself have raised the points, by reference to my judgment in *W v JH*. Had the points been raised, the court would have had to resolve them without the assistance of counsel for Ms Clift. That would have been an onerous task. Ms Clift would not have known what she could appropriately concede and what she should contest. And the court could not have imposed concessions upon her, however advantageous to her they might have appeared to be. These problems are less acute when there is trial by judge alone. At least the judge can then reserve his judgment. With a jury a decision has to be made promptly, before the reasons can be fully set out in writing.

JUSTIFICATION AND MALICE

126. When this judgment is distributed in draft the parties were invited to agree that the reasons for my ruling that these issues both be left to the jury need not be set out, now that the jury have rejected the defence of justification and the allegation of malice. They did agree.

POST SCRIPT

127. Following submissions from counsel the jury were required to give a special verdict. In relation to each of the email and the register questions 1 and 3 were "Have the defendant satisfied you that it is more likely than not that the [email/register] is substantially true?" In relation to the email question 2 was "Has Ms Clift satisfied you that it is more likely than not that when he sent the email Mr Kelleher was malicious…" The words omitted refer to the direction on malice which was given to the jury by me both orally and in writing. The fourth and last question the jury were asked to answer was: "What damages do you award". No question about malice was asked in relation to the Register because counsel agreed that whatever answer was given to question 2, relating to the e-mail, would inevitably apply equally to the Register.

128. The jury answered No to each of the first three questions: they rejected the defence of justification and the allegation of malice. They awarded damages of £12,000 to Ms Clift. So, Ms Clift left court with her reputation vindicated and Mr Kelleher left court without a stain on his reputation.