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IN THE COURT OF APPEAL IN NEW ZEALAND

CA.134/89

BETWEEN TREVOR EDWARD REEVES

Appellant

AND SHONA YVONNE MARY SAXON

Respondent

Coram: Cooke P  
Gault J  
Thomas J

Hearing: 10 September 1992

Counsel: M.M. Mitchell for appellant  
J.M. Conradson and Mrs Anne Stevens  
for respondent

Judgment: 17 December 1992

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JUDGMENT OF THE COURT DELIVERED BY THOMAS J

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The issues on appeal

Mr Reeves has appealed against the judgment of Williamson J given on 5 October 1988. Following a judge alone trial, the learned Judge held Mr Reeves liable in damages for defaming Mrs Saxon. He fixed the quantum of damages payable at \$6,000.

In a vigorous argument, Mr Mitchell, Mr Reeves' counsel, raised three main issues on appeal.

The first relates to Mr Reeves' defence of justification. Mr Mitchell argued that Williamson J was wrong to reject this defence and that he failed to give proper weight and consideration to the evidence, particularly the expert evidence called on behalf of Mr Reeves.

Secondly, it was contended that the learned Judge erred both in fact and in law in rejecting Mr Reeves' defence of qualified privilege in respect of certain of the publications in issue. Williamson J's finding of express malice against Mr Reeves was strongly disputed. It is clearly a finding which rankles with Mr Reeves.

Thirdly, Mr Mitchell submitted that the damages should be reduced if this Court held that certain of the publications were protected by qualified privilege and the appeal was therefore partly successful.

#### Mrs Saxon, the psychic medium

Mrs Saxon claims to be a spiritual psychic medium and a professional clairvoyant. She practices in Dunedin and, although not invariably so, charges clients for her services. Her charge-out rate was initially \$15.00 per quarter hour but was increased to \$20.00 some time prior to the trial.

Mrs Saxon claims to have been born with these paranormal powers. She grew up in an environment in which belief in the supernatural was commonplace. Certain members of her family, she maintains, share her psychic powers. Over the years the spirits of the dead taught her about the spirit world. Mrs Saxon is adamant that

she only passes on to her clients what the spirits have communicated to her. She stresses that she is a medium and has no power to otherwise predict the future.

Mrs Saxon is 51 years of age and lives alone. She works from her home. More often than not, she has a friend, a Mrs Paul, who helps her by acting as a receptionist. Mrs Paul or Mrs Saxon meet clients who call at the house by appointment or, at times, drop in off the street. Clients are taken into Mrs Saxon's bedroom where they are seated. A reading can last from 15 minutes, or sometimes less, to three-quarters of an hour.

Typically, Mrs Saxon will begin the "reading" by asking the client the date of his or her birth for the purpose of ascertaining their astrological sign. From this information she tells the clients some general "run of the mill" things about their personality. On most occasions Mrs Saxon will ask the client for an object, such as a watch or a ring, in order to provide "personal contact". Mrs Saxon then claims to communicate with the client's spirits.

The spirits, described by Mrs Saxon as loved ones, spirit guides or guardian angels, accompany the clients. As Mrs Saxon said, "they actually come up the hall with some of them". Mrs Saxon's initial discussion with the client and the "personal contact" provided by the article obtained from the client allegedly allows her to "tune" into the spirits. These gather about the client and manifest themselves to Mrs Saxon in spirit form, although she sees them "physically" in that they take on a material and human form. They are not, of course, visible to the client. Their manifestation is identical to the body which they had on earth, but is "cleaner", by which we take it Mrs Saxon means more pure. They are not named and seldom, if ever, give a name. "Names", Mrs Saxon said, "mean nothing to them". They are invariably happy. Mrs Saxon says that there are no occasions on which she is

unable to contact the spirits of deceased persons in relation to a client. One or more spirits always come with the client.

Mrs Saxon claims to converse with the spirits through her "inner self". She likened the communication to a prayer to oneself. At times, however, Mrs Saxon claims that the spirits can be heard on "the outer" but it appears that no-one who is not "gifted" like Mrs Saxon can hear the spirits' voices vocalised in this way. Sometimes the spirits communicate with actions as well as speaking. Although Mrs Saxon claimed that there is no language in "God's world", the spirits speak to her only in English as they take on the language of the medium.

When it was suggested to Mrs Saxon in cross-examination that many people who see her are in a distressed and upset condition, she disagreed and said only very few are in that state. She estimated that those who are "worried and needed reassurance" would be about 25 per cent of her clients. However, Mrs Saxon claims that she does not tell her clients bad news. Her evidence as to why this is so is not entirely consistent. At one point in her evidence she purported to receive the bad or distressing news and listen to it, but then not relate that news to her clients. Elsewhere she claimed that the spirit world only told her "good stuff". Be that as it may, Mrs Saxon was at a loss to understand how it could be thought that her services would be harmful to anyone.

Throughout her evidence and lengthy cross-examination, Mrs Saxon remained adamant that she could communicate with the dead.

#### Mr Reeves, the sceptic

Mr Reeves is a beneficiary. Throughout his life he has taken a close interest in what he described as "people-related activities" and "social conditions" and has

supported or championed many causes. He has been a book publisher, and has published a number of books associated with the issues which he has adopted. These interests have included women's rights, drug abuse and related issues, unemployment - a topic on which he wrote the work which he published - the problems experienced by patients in hospitals, and the emotional and other problems associated with home birth. He is also, or has been, a member of many professional groups such as PENZ, the writers' organisation, and the Literary Fund Advisory Committee. At the time of the trial Mr Reeves headed the Tobacco Advisory Council of New Zealand Inc opposing the sale of tobacco products. He was also a member of ASH. Mr Reeves is an active voluntary worker contributing educational programmes to schools, prisons, religious groups, and the like on the dangers of smoking. He also has prepared and presented submissions and papers to the government and other authorities on the topic.

In connection with all these and other issues, Mr Reeves has been a prolific writer of letters to the editor in local newspapers.

This short but incomplete survey of Mr Reeves' public activities confirms his claim to have been interested and concerned for the welfare of people. He testified to being a practising Christian and said that this commitment was important to him. Equally clearly, Mr Reeves' interest and concern is frequently expressed in an active manner. He has often sought positively to change the conditions around him for what he sees to be the better. There is no reason to doubt that he is a public-spirited citizen whose views and concerns are genuinely held and whose actions are directed to improve the plight of the people he has undertaken to support.

It is, perhaps, Mr Reeves' sense of community responsibility and the drive with which he pursues his goals that has been his undoing in this case. At some point

his zeal led him to defame Mrs Saxon in a manner which he could not subsequently justify or excuse to the satisfaction of the Court.

Mr Reeves first developed an interest in the paranormal in about 1976. He quickly concluded that professional psychic clairvoyants are fraudulent, and when the Skeptics Society was formed in 1986 he became a member. Mr Reeves was also a member of COPE, the Committee Opposing Psychic Entrepreneurism. In Mr Reeves' words, this group was established to counsel, help, support and refer people who had had bad experiences with "clairvoyants, psychics, mediums, satanic rights, devil worship and all those sorts of things". It is organised and run by Mr Reeves and his wife.

It was through Mr Reeves' membership of the Skeptics Society that he became aware of Mrs Saxon's activities. He learned that Mrs Saxon had been invited to undertake some tests to verify her ability to communicate with the dead. The incentive to successfully establish that she could do so was a prize of something like \$250,000. Mrs Saxon, he understood, had declined the invitation. Mr Reeves thereafter began to take a close interest in her activities.

Mr Reeves soon concluded that Mrs Saxon was in fact a fraud. He became convinced that she was tricking her clients into believing that she could communicate with the dead and, he alleged, it upset him greatly that people were getting "taken in" by her deception. He was concerned for those clients who were not well off, such as beneficiaries, who were spending money that they could ill-afford on advice which Mr Reeves variously described as "worthless", "false" and "spurious". As Mr Reeves put it, he was concerned for those people who are "under-achievers, under-privileged, people who are vulnerable, groups like the unemployed, people on benefits of one sort or another, sickness benefits, who are being exploited...by her activities as a professional clairvoyant". Mr Reeves was

undoubtedly particularly perturbed that Mrs Saxon was performing this psychic work for monetary gain.

Mr Reeves was also concerned that some of Mrs Saxon's clients would suffer emotional damage as a result of their visits to her. It is clear from the evidence that Mr Reeves became incensed when he learned that the Emergency and Citizens' Advice Service in Dunedin, an organisation in which he had always taken a close interest and given a great deal of support, was giving Mrs Saxon's name as a referral for psychic and clairvoyant services. It probably has to be acknowledged that this activity is not one which most people would associate with a citizens' advice bureau.

Mr Reeves decided to do something. On 3 September 1986, Mr Reeves and his wife arranged to have a reading with Mrs Saxon. They did not disclose their purpose. Mr Reeves took along a tape recorder which he concealed in his wife's handbag. The session was recorded, and we do not doubt that Mr Reeves then felt that he had solid proof that Mrs Saxon was a fraud. He thereupon launched upon a programme of writing letters, both to the authorities and to the newspapers, which resulted in him being sued by Mrs Saxon for defamation.

#### The alleged defamations

On 15 October 1986, an article appeared in the "Midweek" community news column relating to an astrologist visiting Dunedin, one Ruben Romany. It was said in the article that Mr Romany was a sceptic, and this led Mr Reeves to write a letter to the editor for publication in the following issue of "Midweek". A spate of correspondence ensued in which both Mr Reeves and his wife participated.

Mr Reeves wrote to the Director of the Department of Social Welfare in Dunedin on 7 November 1986. Signing his name above the office, "Dunedin Branch, N.Z. Skeptics Society (the New Zealand Committee for the Scientific Investigation of Claims of the Paranormal, Inc)", Mr Reeves indicated that his group had been investigating the activities of Mrs Saxon, a clairvoyant, and referred to the fact that she was on a benefit claiming her teenage daughter as a dependant. There then followed a number of passages which were alleged to be defamatory. The critical extracts can be quoted in full:

"...

We would like to point out to you that she has been making a considerable amount of money through her activities as a "spiritualist/clairvoyant" for many years - all for cash. Up to fifteen people each day have been observed visiting her and we are advised that she charges \$15 per visit for 15 minutes. We know that in a good week she will take in over a thousand dollars and she makes several trips to Invercargill where she advertises, bringing in large amounts of money for her services. We are wondering whether she declares any of her "earnings" on her regular returns to your Department.

...

We have had reports from reputable people (psychologists, social workers etc) that quite a number of disturbed people on welfare benefits have been given inexpert, misleading and very upsetting advice by Mrs Saxon whose "psychic" abilities, we have determined from a separate study made some weeks ago, are non-existent. In short, she is a fraud who has been taking money off people in return for fraudulent advice for many years. We have been told that people like her head for areas of high unemployment where people have a high degree of stress and worry and will turn to anything or anybody for advice. We have had reports that people have asserted that Mrs Saxon has a licence to operate issued by the Dunedin City Council and we understand that Mrs Saxon herself fosters that belief. It is made all the more "believable" by the fact of the people who run the Citizens Advice Bureau's enthusiasm for her services. I feel we don't need to tell you about the Summary Offences Act's reference to clairvoyants and the like.

...

Also, we are wondering whether Mrs Saxon uses another name with respect to her dealings with your Department. Her true name, we have found out, is Mrs Poole and her maiden name was Hurring."



Mr Reeves wrote a letter to the editor of the newspaper which was published on 19 November. The letter related to Mr Romany and described him as "just another witchie-poo fortune teller". He then added:

"I see mention in your columns of Mrs Saxon of Mornington. This lady has redefined the art of cottage industry clairvoyancy into a large scale commercial enterprise, pushing people through from waiting room to 'office' faster than lambs go to the sacrificial altar at the freezing works".

This overstatement was deleted from the published letter. The editor noted that his newspaper would require evidence to support such a claim before it could be published.

A further letter by Mr Reeves was published in the newspaper on 26 November. Mr Reeves' principal concern was whether Mrs Saxon was still listed at the Emergency and Citizens' Advice Service and how she had come to be listed. In the course of this account, he observed:

"... but telling fortunes for money is unlawful. Section 16 of the Summary Offences Act specifically states that anyone acting as a spiritualist medium for monetary reward is liable for fines not exceeding \$1,000."

Mr Reeves pursued his campaign by writing a number of letters which we need not traverse in detail. Suffice to say, he wrote to the Minister of Police seeking to persuade him to bring a prosecution against Mrs Saxon. The following day he wrote to the Superintendent of Police in Dunedin. In this letter, Mr Reeves renewed his allegation that Mrs Saxon was making large amounts of money and enclosed a copy of s 16 of the Summary Offences Act 1981. He also referred to the damage that Mrs Saxon was causing and gave specific instances of the harm for which she was allegedly responsible. Copies of this letter were sent to the Minister of Police and to the Solicitor-General.

In due course the Police reported to Mr Reeves that the matters contained in his letter had been investigated and that Mrs Saxon would not be prosecuted. Mr Reeves responded on 5 December charging that Mrs Saxon was not declaring all of her earnings received from her psychic medium "business", and that she had the previous year put it about the neighbourhood that her "earnings" as a clairvoyant were going to be donated to the United Nation's "Year of Youth". He claimed that a check had been made and that no such donations had been made by Mrs Saxon. Mr Reeves also wrote to the then Undersecretary for Finance, the Hon. Mr T.A. de Cleene, advising him of the attempt being made to have Mrs Saxon's activities stopped and asserting that she was not paying GST. He suggested that she was declaring only some of her income to the Department of Social Welfare.

In the meantime, on 3 December, a further letter from Mr Reeves was published in "Midweek". The thrust of this letter was the support which Mr Reeves alleged Mrs Saxon was receiving, or had received, from the Chairman of the Emergency and Citizens' Advice Service. He went on to say:

"... it is possible to give a little advice to her intending clients. The Summary Offences Act, Section 16, states that paying people like her is unlawful. Go, by all means, but refuse to pay! (either her or her assistant). Mrs Saxon has no recourse in law to extract payment from you."

The last letter alleged to contain a defamatory statement was published in the newspaper on 10 December. In this letter, Mr Reeves referred to the people who attend Mrs Saxon and get sadly disappointed or even emotionally damaged. He then wrote:

"Will she give her services free? Oh no. You don't get to see Mrs Saxon unless you pay \$15 for 15 minutes (as quoted by Professor Beck's Citizens Advice Service). I find it appalling that Mrs Saxon is short-circuiting the doctors by getting people off their medication. I thought that was illegal."

Later in the letter he concluded:

"On a good day Mrs Saxon will reap over \$300. My advice is for people who feel that they have had a bad deal from this woman is to contact the police who, I am sure, will respect their confidentiality in any action they may take."

On the basis of the above publications, Mrs Saxon complained that she had been the victim of a number of libels. The first, and possibly the most serious allegation from her point of view, is that she was, as a psychic medium, a fraud. Such a claim attacks her basic integrity and sincerity. The second defamatory claim is that Mrs Saxon was guilty of a criminal offence, and one which presupposes that she is acting fraudulently. The third defamatory allegation is that Mrs Saxon was defrauding the Department of Social Welfare. The fourth is that she caused harm to people who visited her.

With the exception of the reference in the letter to the newspaper of 10 December claiming that Mrs Saxon deterred people from taking their prescribed medication, Williamson J held, correctly in our view, that each of these charges were defamatory of Mrs Saxon. This finding was not disputed on appeal. Mr Mitchell, for Mr Reeves, however, contended that the defamation was justified.

### Justification

In support of his contention that the trial Judge had failed to give proper weight and consideration to the evidence which supported the defence of justification, Mr Mitchell relied principally on the evidence of the three expert witnesses called on behalf of Mr Reeves. The first was a Professor Marks, a Professor of Psychology and Head of the School of Psychology at Middlesex Polytechnic, London. He is an acknowledged world expert and a reputable author in respect of paranormal matters. The second expert was Dr Dutton, a senior lecturer at the University of Canterbury and former Professor of Philosophy at Michigan

University. Dr Dutton has had a longstanding interest in the paranormal and worked closely in that area in the 1970s and 1980s. The third expert called for the defence was Dr Sullivan, a lecturer at the University of Otago in the Department of Quantitative Studies.

Certainly, the evidence which these expert witnesses gave was impressive. But Mr Mitchell's complaint that the learned Judge did not so much fail to give proper consideration to the evidence as to virtually ignore it, is based on a misconception. Mr Mitchell contended at length that Mrs Saxon was not able to communicate with the dead, nor they with her. A large part of the testimony of all three experts was directed to establishing that there is no scientific evidence to support such a proposition. In particular, they expressed the belief that Mrs Saxon was not communicating with the dead. This belief was based on their examination of the tape-recordings of the reading held with Mr Reeves and his wife and a later sitting attended by another witness, a Mrs Poki Poki. Each expert was emphatic in expressing that conclusion.

For the purpose of this defamation claim, however, this is not the critical question. Neither the ability of psychic mediums generally, nor of Mrs Saxon in particular, to communicate with the dead was directly in issue. In respect of both the allegation that she is a fraudulent medium as well as the charge that she is guilty of a criminal offence, which requires proof of an intention to deceive, the critical question relates to Mrs Saxon's sincerity; does she honestly believe that she is communicating with the dead? If she genuinely holds that belief, she is not acting fraudulently as a medium and would not be guilty of an offence under s 16 of the Summary Offences Act.

The expert witnesses founded their conclusion on the extensive research and investigations into the paranormal which have been carried out during this century.

Professor Marks and Dr Dutton also relied upon their considerable personal experience in investigating such phenomena. Evidence of fraud and fakery has been rife and any medium prepared to undertake an investigation invariably has been found to be a fake. Based on their examination of the two tape-recordings of the readings which she had with Mr Reeves and his wife and Mrs Poki Poki, they identified the use of a number of techniques which are utilised by the sham medium, such as cold reading, fishing and the Barnum effect. Cold reading consists of initially making generalised guesses based on the client's age and sex, often with references to broad astrological descriptions, and then elaborating this conjecture in such a way as to cause the client to believe that what is being said is personal to him or her. To the client, the reading seems to become so accurate in describing his or her character and their problems that the illusion is created that the information is produced by paranormal means. The fishing technique describes the process of finding out what is on a person's mind and then, based on that knowledge, deducing the nature of the person's problems. At times, apparently, the medium purports to provide persuasive and convincing solutions. Another part of the cold reading technique is the Barnum effect. The client's reaction to a guarded personal comment is observed closely. Correct guesses are then exploited and inaccurate guesses are retracted or re-interpreted. In this way the medium builds up a description of the client's past, his or her current problems, and their future expectations. The client succumbs to the notion that the "advice" must be inspired by some kind of paranormal or psychic phenomena.

The three experts said that the tape-recordings of the readings provided classic examples of the use of these techniques. But a lay observer reading the transcripts could perhaps be forgiven for thinking that her use of them was somewhat imperfect. While it is possible that in the environment created at a reading, Mrs Saxon's purported communication with the spirits might seem more plausible, much of the conversation in the transcript is notable for its vacuity.

Not unsurprisingly, the expert witnesses called by the defence concluded that, not only was Mrs Saxon not communicating with the dead, but also that she must *know* that she was not communicating with the dead. Professor Marks concluded that there was no evidence of anything other than a cynical and planned strategic use of the well-known techniques which we have described. He could not believe that Mrs Saxon used these techniques without knowing what she was doing. He stated bluntly that she knows that she is not in contact with the spirits at all but is using that claim to bolster her ability to convince strangers that she can tell them things that she is not supposed to know. Dr Dutton also utterly rejected any suggestion that Mrs Saxon has any paranormal abilities. He concluded that he had heard nothing to suggest that Mrs Saxon had a genuine belief in her own powers as a medium. He expressed the view that, while Mrs Saxon may think that she possesses some kind of intuitive ability in dealing with people, it is not reasonable to imagine that she thinks she is talking to the dead. It was his firm opinion that she must know that she was making up the messages and must know that she was then falsely claiming that these messages came from a life hereafter. Dr Sullivan also expressed the view that Mrs Saxon was insincere.

As convincing as this evidence might be, however, it is not conclusive, and was not regarded by the trial Judge as being conclusive. None of the experts satisfactorily excluded the possibility that Mrs Saxon might actually believe that she was communicating with the spirits of her clients. Professor Marks acknowledged that it is necessary to consider each individual case to assess the sincerity of a medium. Having described the cold reading technique, Dr Dutton said that it could be used so successfully that many people who employ it sincerely believe that they have psychic powers. He conceded that in an article which he had written he had referred to the fact that some mediums have a genuine belief in their own psychic powers. "With regard to sincerity", he said, "mediums are a very difficult case".

Dr Sullivan was even less emphatic in his opinion. He referred to the unusual nature of Mrs Saxon's claims, describing them as visual and auditory hallucinations produced several times a day. While he clearly thought this a pretence motivated by financial gain, he expressed himself only as not being "convinced of her sincerity on the balance of probabilities". He stressed that his belief that she was insincere was based largely on the two transcripts and that he had not been able to observe Mrs Saxon directly.

A Mr Linzey, a lecturer in the Department of Education in Dunedin, in fact, had attended a reading of Mrs Saxon as part of his work. He was called as a witness by Mrs Saxon. He declined to accept that it could be concluded from the transcripts alone that her technique was that of cold reading. When asked whether he considered it legitimate to draw any inference as to Mrs Saxon's sincerity or lack of sincerity, he simply replied, "No".

With this evidence before him, together with conflicting accounts of Mrs Saxon's activities, Williamson J held that it had not been established that Mrs Saxon was insincere in her claim to be a psychic medium. Apart from the testimony of the experts, the Judge heard a considerable body of evidence from people who had been interviewed by Mrs Saxon. They were convinced that she had some paranormal skills and entertained no doubts about her sincerity. The Judge was particularly impressed by the evidence of a Mrs Hansen, a solicitor, in this regard.

While the Judge was not prepared to find on the basis of this evidence, therefore, that Mrs Saxon believed all the statements which she had made concerning her powers, he concluded that she might well believe that she had the power to communicate with spirits. He specifically found that it had not been demonstrated that she was acting with intent to deceive.

We do not propose to reverse the learned Judge's finding. He had the real advantage of hearing and seeing Mrs Saxon give evidence. In assessing the evidence, and her evidence in particular, the learned Judge accepted Mr Mitchell's invitation to apply the civil burden of proof, the balance of probabilities, but correctly added that, in deciding whether or not the burden had been discharged, he must have regard to the gravity of the case and the seriousness of the allegations. This approach is entirely appropriate when the allegation made is one of fraud.

We too would clarify, as did Williamson J, that we are not holding that Mrs Saxon is able to communicate with the dead. The evidence is compelling in suggesting that she cannot do so. But if Mrs Saxon is genuine in her belief that she is in fact communicating with spirits, she is merely deluded or misguided. It is affirmed, if any affirmation is required, that those who are deluded or misguided have the same right as anyone else to protect their reputation against charges disputing their sincerity.

The next allegation which Mr Reeves sought to justify was that Mrs Saxon was guilty of a crime, namely, under s 16 of the Summary Offences Act. Section 16 provides that every one who, acting for reward with intent to deceive, purports to act as a spiritualistic medium or to exercise any powers of telepathy or clairvoyance commits an offence. As already recounted, Mr Reeves made several statements asserting that Mrs Saxon was in breach of this section. It was, if anything, the point which he was most prone to press in his letters to the newspapers.

Mr Reeves was never able to satisfactorily explain how he came to disregard the element of intent when referring to s 16. The most that Mr Mitchell could say on Mr Reeves' behalf is that it could not have impinged upon his mind. Even without the requirement of fraudulent intent being expressly mentioned, however, many people would be likely to import that notion into the allegation that Mrs Saxon was



guilty of an offence in acting as a medium. They would assume, correctly, that it meant that she was not only a false medium but that she knew that she was a false medium.

For the reasons we have given when dealing with the allegation of fraud against Mrs Saxon as a medium this element cannot be justified. Once it is accepted that it has not been established that Mrs Saxon is insincere, it follows that it has not been established that she intends to deceive her clients. In such circumstances, it cannot be said that she is committing a crime. Mr Reeves' plea of justification again must fail.

The next allegation is Mr Reeves' claim that Mrs Saxon was defrauding the Department of Social Welfare by not declaring her true income and thereby obtaining a benefit to which she was not entitled. Williamson J held that the evidence did not establish this charge on the balance of probabilities. The learned Judge acknowledged that there was evidence that Mrs Saxon did not keep good records and that she was a "little vague" as to the exact amounts received. But, he found, the evidence of the number of persons attending at her home and whether or not they were paying customers was "woefully inadequate".

While the evidence in that respect may have been wanting, we must disagree with the learned Judge's conclusion. Elsewhere in his judgment, Williamson J said that he was not impressed with Mrs Saxon's evidence about the records that she kept, either as to the number of persons who had visited her or the money which she had obtained from her fees. He held that her replies to questions in relation to records and numbers was less than entirely satisfactory. The Judge also noted that although Mrs Saxon had filed returns with the Inland Revenue Department and completed declarations in order to obtain the Social Welfare benefit, she had not retained the

base records to justify the returns which she had filed. These misgivings on the part of the Judge were undoubtedly warranted.

It is impossible to read Mrs Saxon's evidence and, in particular, have regard to the return which she submitted to the Inland Revenue Department in 1987, without being inexorably drawn to the conclusion that she failed to declare her true income. Mrs Saxon acknowledged that she had kept no records to support the precisely-stated gross figure of \$2290.00 which was entered in her return for that year. Nor had she any current data, as at the time of the trial, on which she could base her 1988 income. Mrs Saxon proposed to estimate this by having regard to her previous year's "income". This process is one which confers no greater validity on successive returns than that which might be obtained by the purest chance. Yet, it is these returns which were then submitted to the Department of Social Welfare in order to enable Mrs Saxon to qualify for a benefit. Certainly, her default in keeping any record of her earnings might be thought to be due to her method of operation and personal failings, but it cannot obscure the fact that Mrs Saxon's return of income is at best an estimate unrelated to any data and, each year, conveniently struck at a level which does not disentitle her from obtaining a welfare benefit.

Mrs Saxon certainly held herself out as acting for reward. She advertised her services as such at the then rate of \$15.00 per quarter of an hour. She was listed as a referral by the Emergency and Citizens' Advice Service at that rate, and she charged Mr Reeves and his wife and Mrs Poki Poki at the same figure. The evidence of her neighbour, who kept watch on Mrs Saxon's home and gave evidence of the number of persons calling, may not have been given much weight by the trial Judge but it cannot be entirely discounted. Williamson J thought that the neighbour's evidence suffered from a significant defect in that she was unable to identify whether the persons visiting Mrs Saxon's home were paying clients or not.

While this may be so, the disparity between what her evidence suggests and what Mrs Saxon admits as her income is too great to entirely disregard. Not even a full acceptance of Mrs Saxon's credibility could conceal the shortcomings in her evidence. Indeed, it would be naive for the Court not to recognise that Mrs Saxon was returning a false income return and then utilising that return to obtain a benefit to which she would not be otherwise entitled.

We do not consider, as the learned Judge may have inferred, that it is relevant that much of the evidence relating to Mrs Saxon's activities in this regard was not known to Mr Reeves when he wrote the offending letters. The question is whether or not he was able to demonstrate that his allegation was true. We are of the firm view that on the balance of probabilities he clearly did so, and the learned Judge's finding that Mr Reeves was not justified in this respect is therefore reversed.

Mr Mitchell no doubt recognised the strength of this ground for he forcefully argued that, once it is accepted that Mrs Saxon was fraudulent in this regard, the defence of justification must prevail overall. To support this submission Mr Mitchell contended that Mr Reeves' defamatory statements were tantamount to a general allegation of fraud. A finding that Mr Reeves was justified in asserting that Mrs Saxon was fraudulent in one respect would therefore defeat the whole claim. We do not agree. Although the element of fraud may be a theme which is common to the most serious of the defamatory statements which were made, Mrs Saxon did not plead her case in that way. As indicated above, the allegations of fraud are actually two-fold; that Mrs Saxon, on the one hand, was a fraudulent medium and, on the other, that she defrauded the Department of Social Welfare. She may be guilty of defrauding the Department and yet still be sincere in believing that she is a psychic medium able to communicate with the dead. Nor, of course, does either finding effect the charge that Mrs Saxon is guilty of a breach of the law. We

therefore reject the suggestion that, for Mr Reeves' plea of justification to succeed generally, it is enough to establish that his statements are true in one respect only.

The next defamatory allegation to be considered is that Mrs Saxon caused damage to people who visited her. This damage, Mr Reeves alleged, included emotional harm resulting from the misleading, upsetting and inexpert advice which Mrs Saxon gave to persons who were particularly vulnerable, as well as harm caused to people who are diverted from their prescribed medication. The claim of justification was shortly dismissed by the learned trial Judge. He held that, in the final analysis, there was no evidence of any such harm other than the opinions expressed by the experts to the effect that such results may follow if certain types of person were to visit Mrs Saxon.

It is correct that the evidence of the experts is of a general character. Dr Dutton, for example, pointed out the damage which can be done to persons who have troubled minds or who are otherwise vulnerable when they are led to believe by a medium that they have received advice from a parent or other close family member. Such people, he said, often have serious personal problems. Others face important decisions and yet look to a medium for guidance believing that the medium has the ability to tap the wisdom of the departed. Professor Marks also touched upon the potential harm or danger of the activities of spiritualistic mediums. He said that through his work as a psychologist he had frequently been approached by persons who had visited mediums. He knew of many examples where emotionally disturbed individuals had received advice which could have harmed them or caused them increased emotional distress. The advice which they received related to significant personal problems such as illness, disease, mental illness, dying, family problems, marital problems, old age problems, and the like. He reiterated what Dr Dutton had said; because the advice purportedly comes from deceased relatives and has an alleged spiritual source, it can easily be given undue weight.

There is, to our mind, no reason to believe that Mrs Saxon's clientele would not include a number of people in these unfortunate categories. A combination of vulnerability and gullibility would make them readily susceptible to her claim that they were being advised by one or more of their loved but deceased relatives. It is likely that in at least some cases emotional or psychological harm would result or an ill-advised action would be taken by the client because of the spiritual advice. In this context, Mrs Saxon's own acknowledgement that about 25 per cent of the people who visit her are worried and need reassurance is itself disturbing.

The fact remains, however, that there was no specific evidence which established that Mrs Saxon had caused any such damage. No direct evidence was called to show that she caused harm to any particular client and none of the instances of personal harm which Mr Reeves had heard about, and which he passed on to the Police, proved well-founded. In the absence of any actual evidence showing that Mrs Saxon's clients fall within the description of those who suffer or have suffered harm of the kind described by the experts, we are not prepared to interfere with Williamson J's decision that the defence of justification fails in respect of this charge also.

Finally, there is the question whether Mrs Saxons' clients suffered harm by being diverted from properly prescribed medication. Mr Reeves was quite emphatic in this respect. He said, in effect, that Mrs Saxon was "getting people off their medication". It is incomplete, however, to refer to this allegation without also alluding to an earlier letter to which Mr Reeves was responding. On 3 December a letter by "Y.M. and H.M. For Truth" had been published in the same column. In that letter the writer had said that Mrs Saxon had helped him through very stressful problems and observed that she "saved me from being on doctors' drugs as many of you are". Without doubt it was this statement which Mr Reeves was referring to

when he said that he was appalled that Mrs Saxon was short-circuiting the doctors by getting people off their medication.

It is acknowledged that there is a distinction between saving people from being put on doctors' drugs and "getting people off their medication". The distinction is tenable in that it is one thing to suggest that Mrs Saxon's ministrations to her clients were such that they did not need medication and quite another to suggest that she took them off their existing medical prescriptions.

Notwithstanding that the distinction may be tenable, however, it remains a fine distinction in the context of the correspondence. In claiming to have been saved from being on doctors' drugs, "Y.M. and H.M. For Truth" do not preclude the possibility of having been on such medication before encountering Mrs Saxon. There is no apparent reason why Mr Reeves should not have adopted this view. He was undoubtedly concerned that people might desist from taking their medication as a result of seeing Mrs Saxon. But, as Williamson J pointed out, there was no firm evidence that Mrs Saxon herself had ever encouraged anybody to stop taking prescribed medication. We are not prepared, therefore, to interfere with the Judge's finding that the claim had not been justified.

In the result, Mr Reeves' plea of justification must fail in all respects save one. The one respect in which it was established to the requisite burden of proof relates to the allegation that Mrs Saxon was defrauding the Department of Social Welfare and obtaining a welfare benefit by failing to declare her true income. However, for the reason which we have given, the finding cannot of itself serve to substantiate the defence of justification in respect of the other defamatory statements which are in issue.

Qualified Privilege

Mr Reeves raised the defence of qualified privilege in respect of the letters which he wrote to the Police and the Department of Social Welfare. The letters were privileged, it was contended, because Mr Reeves had a duty to report Mrs Saxon's activities and the recipients an interest in receiving his complaint.

We agree that the letters which Mr Reeves wrote to the Police and to the Department of Social Welfare were protected by qualified privilege. In those letters Mr Reeves was seeking to report suspected fraudulent behaviour or criminal offences, or matters which he believed constituted fraudulent and criminal misconduct. The public interest in ensuring that such matters are reported to the Police and other authorities, and in ensuring the apprehension of those who break the law, necessarily means that the occasion is privileged and that letters written for that purpose will be protected by the privilege. Nevertheless, the privilege will be destroyed if the sole or dominant motive of the person making the allegedly defamatory statements is malicious.

Williamson J had no hesitation in holding that Mr Reeves was motivated by "an intention to injure the plaintiff" and that he was therefore motivated by malice. He concluded that, while Mr Reeves' original intention was to challenge Mrs Saxon's psychic or paranormal abilities and, possibly, to obtain some satisfaction by exposing her actions, as he progressed he decided to attack her overall integrity.

Mr Mitchell initially argued that this conclusion by Williamson J did not amount to a finding that Mr Reeves' motivation to injure Mrs Saxon was his sole or dominant motive. Although it is true that the learned Judge did not express his reasoning in those terms, we cannot accept that contention. The only sensible construction to place upon the Judge's observations that Mr Reeves' intention progressed from the motive of challenging Mrs Saxon's psychic or paranormal powers to one of attacking her overall integrity, is that this latter purpose had become his dominant

motive. The Judge's attitude is summed up in the metaphor which he used of Mr Reeves "playing the man and not the ball". It is, perhaps, an inapt metaphor in a case such as this because it is difficult to see how Mr Reeves could legitimately challenge Mrs Saxon's psychic abilities without at the same time impugning her integrity and damaging her in a personal sense. However, be that as it may, we are satisfied that the Judge intended to convey that Mr Reeves' original legitimate intention of challenging Mrs Saxon's paranormal powers was overtaken or overwhelmed by an improper intention to damage Mrs Saxon personally, and that this latter motive became his dominant motive.

It is, however, altogether another question whether this view was properly open to the learned Judge on the evidence. The evidence of malice on Mr Reeves' part was hardly strong. Williamson J discerned malice from a total assessment of all the evidence which was presented, and thought that Mr Reeves' attitude in giving evidence lent weight to the inference that he was actuated by malice. It is to be borne in mind that the Judge had the advantage of seeing and hearing Mr Reeves. He considered him an unimpressive witness who appeared to shift his ground and, at times, to be evasive. The most striking illustration of what the learned Judge had in mind, we would think, was Mr Reeves' claim in evidence that, when he suggested in his complaint to the Department of Social Welfare that Mrs Saxon was making a false declaration of her income and wrongfully qualifying for a benefit, he did not think that he was making an allegation of dishonesty. Another example would be his reason for suggesting to the Department of Social Welfare that Mrs Saxon might be using a false name. He claimed to have put forward an alternative name he thought Mrs Saxon "might" be using so that it would be easier for the Department to check on her. In conveying this information, he said, he did not intend to infer a fraudulent motive to Mrs Saxon. Mr Reeves also shifted his position in explaining his omission to have regard to the fact that s 16 of the



Summary Offences Act requires the medium to be acting with an intent to deceive before an offence is committed.

The evidence, however, must be assessed having regard to *Horrocks v Lowe* [1975] AC 135, the leading authority on this issue. Williamson J does not appear to have adhered to the full purport of this decision. The judgment of Lord Diplock deserves more faithful attention. The distinguished Law Lord delineates the function of qualified privilege, and defines the scope and content of the malice which must be established before that privilege is destroyed by repeated reference back to that function. The concept of malice which emerges is much more restrictive than that which the Judge appears to have entertained in giving his judgment.

Essentially, the defendant must misuse the privileged occasion for some purpose other than that for which the privilege is accorded by the law before malice can be said to exist. Until then the defendant is entitled to the protection of the privilege which the law has identified in the public interest.

The foremost evidence of express malice is generally that the defendant did not believe that the statements which he or she published were true. Qualified privilege cannot extend to protect someone who has chosen to tell deliberate and injurious falsehoods about another. It is also correct, as Lord Diplock points out, that if someone publishes a defamatory statement recklessly, without caring or considering whether it be true or not, he or she is treated as if they knew it to be false. The only kind of recklessness which can destroy the privilege, therefore, is indifference to the truth or falsity of the statement. For that reason indifference is not equated with carelessness, impulsiveness, or irrationality in arriving at a positive belief that it is true. It is not enough that the maker of the statement has jumped to conclusions which are irrational, reached without adequate inquiry, or based on

insufficient evidence if the defendant nevertheless believes in the truth of the statement itself. (At pp.150 and 153).

Lord Diplock summed this point up as follows (at pp.150-151):

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

It is important that the privilege attaching to communications to the Police and other authorities which seek to report a breach of the law should not be strictly constrained when determining whether express malice can properly be found. Citizens are under a social and moral, if not legal, duty to report offences against the law of the land. See, for example, *Lightbody v Gordon* (1882) 9 R, at pp.937-8, 939 and 940 (Ct. at Sess.) and *Croucher v Inglis* (1889) 16 R at p.778. They are often exhorted by the Courts and those in authority to do so. It is in the public interest that they should not be unduly inhibited in performing that duty or exercising that right. Lord Dunedin's observation in *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495, at p.508 is apt:

"To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

In this respect, it is unrealistic to expect ordinary people when writing letters of this kind to display the precision, the logic, or the sense of relevance to which lawyers aspire. Yet they are just as entitled to the protection which privilege confers in the absence of express malice. Lord Diplock expresses the need to approach questions of this kind in a realistic manner (at p.150):

"The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more."

In summary, what the law demands in determining whether the perpetrator of defamatory material is actuated by malice is that he or she not step outside the bounds of the privilege which the occasion attracts. Those bounds can only be determined by having full regard to the function of qualified privilege in general, and the legitimate duty or interest which the law has recognised should be protected by that privilege in the particular case. The words or acts of the defendant which allegedly provide evidence of malice are then to be judged in accordance with a realistic appreciation of human conduct. It is not enough to simply ascertain whether the defendant has said or done anything which is unnecessary or irrelevant to accomplish the purpose which he or she is legitimately pursuing. Malice is not to be gauged by such a perfunctory or narrow exercise. That question, if it is to be asked at all, is to be asked in the context of the broader question whether the defendant's conduct is such that he or she should be deprived of the protection to

which they are entitled in law. Only proof of a dominant and improper motive inimical to the duty or interest which is protected by qualified privilege will destroy that protection. Otherwise, it becomes illusory and the public interest which it serves will be defeated.

To our mind, therefore, the pre-eminent exposition of the law by Lord Diplock in *Horrocks v Lowe* on one hand, and the facts as found by Williamson J on the other, make an uncomfortable match. The fact is that, however much Mr Reeves may have come to despise Mrs Saxon as the fraudulent perpetrator of fakery which he believed was harmful to vulnerable people, the evidence that his motive was a desire to injure her personally, as distinct to putting a stop to her activities, would seem to be tenuous.

There seems to be no suggestion in the judgment that Mr Reeves did not believe what he said about Mrs Saxon, or that he was indifferent to the truth of what he wrote in the letters in the sense described by Lord Diplock. Indeed, the evidence points to exactly the opposite conclusion. Mr Reeves fervently believed that Mrs Saxon was a fraud and equally emphatically believed that he had obtained the evidence to support that claim.

In deciding that Mr Reeves was not entitled to the protection accorded the privileged occasion, the Judge focused on the popular meaning of malice as a "desire to injure the person defamed". It connotes personal spite or ill-will. (See Lord Diplock, *supra*, at p.149). In this case, this would mean that Mr Reeves' desire to perform his perceived public duty of informing the Police and the Department of Social Welfare that Mrs Saxon was a fraud would have to be supplanted by a desire to give "vent to his personal spite or ill-will" towards Mrs Saxon. It would need to be of such intensity that it outweighed his positive belief in the truth of what he published and so destroyed the protection of the

privilege to which he would otherwise be entitled. We do not consider that the evidence can support such a finding.

Nor do we discern anything in the letters to which the protection attaches which would take them outside the bounds of the privilege. They cannot fairly be said to contain material which is not germane or pertinent to the interest which created the duty. See *Adam v Ward* [1917] AC 309, per Lord Loreburn at p.321. In determining whether any material in the letters is irrelevant or unnecessary, the test as stated by Lord Diplock, is not whether it is logically relevant. It is 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 the irrelevant defamatory matter to vent their personal spite or ill-will, or for some other improper motive. (See Lord Diplock, *supra*, at p.151). Nothing in the letters fits this description. Any prejudice which Mr Reeves came to bear towards Mrs Saxon as the perpetrator of the fraud did no more than cause Mr Reeves to honestly believe what, in Lord Diplock's terms, a more rational or impartial person would reject or doubt. But he does not thereby lose the protection of the privilege.

Apart from his impression of Mr Reeves as a witness, the Judge put forward a combination of six factors to support his finding of express malice. For ourselves, we do not find them convincing. Williamson J first referred to the fact that Mr Reeves wrote, not only to the Police, but also to both the local Dunedin and Head Office of the Department of Social Welfare and to the Dunedin Emergency and Citizens' Advice Service (Inc). But it must be asked why any of these letters, which are the very kind of letters intended to attract qualified privilege, should reflect malice on Mr Reeves' part? Reference is then made, in the second place, to the fact that matters raised in the letters go beyond a mere complaint or report of

fraudulent misconduct. This may be so, but, as indicated above, any hyperbole, excess or prejudice which might be disclosed is within the bounds of the latitude which established principle, as well as commonsense, confirm should be permitted in letters of this kind.

Thirdly, there was reference to the fact that Mr Reeves did not accept the negative outcome of his complaints to the Police and the Department of Social Welfare, but this is as much evidence of the zeal a man who firmly believes in what he is saying and doing as it is evidence of spite or ill-will towards Mrs Saxon. With his background of furthering public interest activities, Mr Reeves would not be accustomed to accept the first or initial reaction of those in authority.

Mr Reeves' constant omission to refer to the vital words in s 16 of the Summary Offences Act is listed next. Yet, while Mr Reeves' failure to focus on the requirement is unsatisfactory, it does not provide any evidence that he did not believe that Mrs Saxon was in fact fraudulent. Once that is accepted it is difficult to see how it can be said that his primary motive was to injure Mrs Saxon as distinct from putting a stop to her activities. All the evidence points to the contrary. In truth, it is not realistic in the circumstances of this case to try to distinguish between putting a stop to her activities and injuring her. An intention to stop them necessarily involved an intention to injure her. A finding of malice might still be warranted if Mr Reeves had acted out of spite; but we cannot regard the evidence as supporting such a view of his motivation.

Nor is the manner in which Mr Reeves conducted his investigations by secretly recording the interviews with Mrs Saxon, and his attitude in having done so, evidence that Mr Reeves did not believe in the truth of what he published or that he was dominated by a desire to personally injure Mrs Saxon. Again, on the contrary, Mr Reeves adopted these tactics in order to reveal Mrs Saxon as the fake which he

believed her to be. Moreover, he did so at a time when the Judge accepted that his intention was the legitimate purpose of challenging Mrs Saxon's psychic or paranormal powers.

Finally, Williamson J referred to Mr Reeves' use of his membership of the New Zealand Skeptics Society and its letterhead. But it is to be borne in mind that Mr Reeves was an active member of the Society and that the ground-rules for making statements or writing letters on behalf of what was a loosely-knit organisation had not been firmly spelt out. We are satisfied that Mr Reeves believed that he was entitled to sign his name over a reference to the Dunedin branch of the Skeptics Society. He probably saw himself as being that Branch.

The tenuous nature of the evidence to support the finding of express malice is brought out by an analysis of Mr Reeves' motivation. Confusion will arise unless the distinction between Mr Reeves' legitimate objective of putting a stop to Mrs Saxon's activities and the illicit objective of acting out of a desire to personally injure her is kept in mind. The correct question is whether Mr Reeves' pursuit of, or campaign against, Mrs Saxon went beyond the objective of endeavouring to show her up as a fake and put a stop to her activities. There is little reliable evidence to show that his intention went further than that. In challenging Mrs Saxon as a fake medium, he wished to bring her activities as a spiritualistic medium to a halt. Mr Reeves' concerns in that regard have been traversed earlier in this judgment. But an open and fervid desire to prevent Mrs Saxon from carrying on her practice as a psychic medium for reward, either by exposing her as a fake or disqualifying her from obtaining a benefit if she persisted in charging people for her fraudulent services, does not reflect the personal animus necessary to found a finding of express malice. Mr Reeves "wanted to get results" but there is no real evidence that he was motivated by personal spite.

We therefore consider that the Judge's finding of express malice cannot stand. This being the case, Mr Reeves' defence of qualified privilege succeeds in respect of the letters which he wrote to the Police and the Department of Social Welfare. The question of damages remains.

### Damages

Mr Mitchell did not wish to address the Court on the question of the quantum of damages other than to submit that in the event of the appeal being allowed in part, that is, on the question of qualified privilege, the damages should be reduced accordingly.

On this question, two factors have to be borne in mind. First, we consider that the sum of \$6,000 is a modest award, especially having regard to the fact that Mrs Saxon's sincerity had been publicly impugned. Secondly, publication of the letters to the Police and the Department of Social Welfare were limited to the recipients. Indeed, Mr Reeves wrote the letters believing that they would be treated confidentially. But for the litigation they would not have had any wider circulation and would not have been seen by Mrs Saxon. We do not imagine that the trial Judge apportioned a significant measure of the damages which he awarded to these restricted libels.

When regard is had, then, to the main defamatory publications, namely Mr Reeves' letters to the newspapers, \$6,000 in damages may seem small enough. But we are not satisfied on the facts of this case that even that award can properly be left standing once it is accepted that Mr Reeves was not in truth actuated by malice. We do not know what sum the Judge would have awarded if he had not taken that view. An adjustment is appropriate to allow for the fact that the appeal succeeded



on that question. We consider that an award of \$4,500 meets the merits of the case.

The appeal is allowed in part on the basis just indicated.

The award of costs and disbursements in the Court below is quashed. In the special circumstances of this case, including the position relating to legal aid, no order for costs is made in respect of the appeal to this Court either.

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a horizontal line that ends in a small hook.

Solicitors:

Mitchell & Mackersy, Dunedin, for appellant