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Privy Council Appeal No. 53 of 2003

Owen Robert Jennings *Appellant*

v.

Roger Edward Wyndham Buchanan *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 14th July 2004

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Dame Sian Elias

*[Delivered by **Lord Bingham of Cornhill**]*

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1. In a judgment delivered by Keith J, a majority of the Court of Appeal (Richardson P, Gault, Keith and Blanchard JJ, Tipping J, dissenting) (reported as Buchanan v Jennings [2002] 3 NZLR 145) succinctly defined in paragraph [1] the principal issue in the appeal before it, which is also the principal issue in this appeal to the Board:

> "whether a Member of Parliament may be held liable in defamation if the Member makes a defamatory statement in the House of Representatives – a statement which is protected by absolute privilege under article 9 of the Bill of Rights 1688 – and later affirms the statement (but without repeating it) on an occasion which is not protected by privilege."

The majority concluded (paragraph [1]) that a member may be held liable and that the defendant had been rightly held liable in this case. Tipping J dissented from this conclusion. He held (paragraph [130]) that repetition to whatever extent by an MP of words spoken in the House becomes actionable only if the words spoken or written outside the House are defamatory in themselves, on a stand-alone basis, without the need for reference to any words spoken in the House.

2. Mr Buchanan, the plaintiff in the action, is a senior official of the New Zealand Wool Board. At all material times the defendant, Mr Jennings, was a Member of Parliament. In the course of a parliamentary debate in the House of Representatives on 9 December 1997, Mr Jennings made observations defamatory of the part played by a Wool Board official in procuring Board sponsorship of a rugby tour to the United Kingdom. It has not been contested that the official referred to, although not named, was identifiable as Mr Buchanan. It is unnecessary for present purposes to repeat the text of these observations. It is enough to record that they seriously impugned Mr Buchanan's personal and professional integrity. Mr Jennings' remarks attracted some public attention for a time, but interest subsided and Mr Jennings sought to revive it by a press release issued on 15 February 1998 in which he renewed, although in less specific and more impersonal terms, his attack on the Board. This press release prompted a reporter (Mr Speden) of *The Independent* to interview Mr Jennings. In the course of this interview Mr Speden asked Mr Jennings in detail about his parliamentary statement and, according to the report of the interview published in the newspaper on 18 February 1998,

> "Jennings said he did not resile from his claim about the officials' relationship …"

3. Mr Buchanan issued proceedings. In his second amended statement of claim he pleaded Mr Jennings' words used in the House on 9 December 1997, adding that he would refer to and rely on the full wording in the *Hansard* report at trial to "establish as an historical fact" that the words had been spoken by Mr Jennings. He also pleaded that Mr Jennings, by saying what he had to the reporter, had "adopted, repeated and confirmed as true" what he had said in the House. Mr Buchanan based his claim on this statement to the newspaper, made by Mr Jennings with knowledge that what he said would be widely published. He also pleaded a second cause of action, which gives rise to no issue in this appeal. Mr Jennings' defence consisted, in the main, of bare denials. He

denied the pleaded effect of his interview with the newspaper, and that he had then adopted, repeated or confirmed as true his parliamentary statement. But he admitted that he had used the words attributed to him in the House, pleaded that the words in question had been spoken under the protection of parliamentary privilege and pleaded that the claim against him infringed the protection given to him by article 9 of the Bill of Rights. He pleaded no defence of justification or fair comment.

4. In reliance on his defence of absolute privilege, Mr Jennings applied to strike out Mr Buchanan's claim, but he failed before Master Thomson ([1999] NZAR 289) and, on appeal, before the High Court (Randerson and Neazor JJ: [2000] NZAR 113). His defence of absolute privilege was rejected at trial by Heron J, who awarded damages of $50,000 to Mr Buchanan ([2001] 3 NZLR 71). It is this award, upheld by the Court of Appeal majority, which is challenged before the Board ([2002] 3 NZLR 145). The significance of the principal issue defined above is reflected in the decision of the Speaker to invite the Attorney General to seek leave to intervene in support of Mr Jennings' argument on absolute privilege. As a result, the Board has enjoyed the benefit, also enjoyed by Heron J and the Court of Appeal, of submissions made by the Solicitor General, Mr Terence Arnold QC.

5. Before turning to this principal issue, it is convenient to address another point briefly but effectively argued by Mr Gilkison for Mr Jennings. He contended, quite correctly, that it is the duty of a defamation plaintiff to plead the words said to be defamatory. This, he submitted, Mr Buchanan failed to do, since Mr Speden had not been able to vouch that the words used in his report ("Jennings said he did not resile …") were the precise words used by Mr Jennings, and in particular was unable to say whether "resile" was a word first used by him or by Mr Jennings. Having carefully considered this submission, the Board is satisfied that it cannot succeed. Where an oral statement is complained of, it is rarely possible (in the absence of a recording, a transcript or a very careful note) for a plaintiff to establish the precise words used by the defendant. But the law does not demand a level of precision which is unattainable in practice. The plaintiff must plead the words complained of, but it is enough if the tribunal of fact is satisfied that those words accurately express the substance of what was said. Mr Speden was adamant that "resile" was not a sub-editorial interpolation (unlike another expression in his report, which he identified) and insisted that he had accurately conveyed the effect of a long interview. He was not seriously challenged in cross-

examination, Mr Jennings did not give evidence to put forward a different account of the interview, and the judge plainly accepted Mr Speden's evidence (see paragraphs [15], [16] and [49] of his judgment). It cannot matter whether Mr Jennings said "I do not resile …" or whether, perhaps more probably, Mr Speden asked "Do you resile …?" And Mr Jennings answered "No". The law of defamation, which already has its critics, would incur justified criticism if the outcome of actions were to turn on differences of language giving rise to no difference of meaning.

Absolute privilege

6. In New Zealand, as in other liberal democracies, a very high value is attached to freedom of speech and expression as the necessary condition of good government, intellectual progress and personal fulfilment. For many years the law has however recognised also that such freedom cannot be absolute. Thus the right to freedom of expression, now protected by section 14 of the New Zealand Bill of Rights Act 1990, is subject under section 5 to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. One such reasonable limit has long been prescribed by the law of defamation, restricting as it does the freedom of one person to publish false and defamatory statements about another. In this instance the general public interest in free expression yields to another aspect of the public interest, that which recognises the need to afford a measure of protection to the reputation and credit of individuals. The civil law of defamation is the legal means through which this protection is given.

7. The general right to redress which the law of defamation gives to those injured by false and defamatory publications is not, in its turn, absolute. In some situations the value of free and open communication is held to outweigh the interest of the individual who may be injured by a false and defamatory statement. In such situations the law gives the publisher a qualified privilege: that is, a defence to any claim made against the publisher, even though the statement is shown to be false and defamatory, so long as he is not shown to have been improperly motivated in publishing what he did (is not shown, in the technical language of the law, to have acted maliciously).

8. In other situations the value of free and open communication is held to require an even stronger measure of protection, the giving to the publisher of a false and defamatory statement a privilege

which is absolute, indefeasible even if the publisher was improperly motivated (or malicious). Proceedings in court are one situation in which absolute privilege attaches to statements made: any claim based on such a statement may (subject to a possible but immaterial exception) be defeated by a defence of absolute privilege. This is not a privilege accorded for the benefit of those participating in court proceedings. It is a privilege given because the public requirement that justice should be done and seen to be done, and that those acting should do so without fear of subsequent civil suit, outweighs the interest of an individual injured by a false and defamatory statement made in the course of such proceedings. Parliamentary proceedings are the other main situation in which absolute privilege attaches to statements made, and is the situation with which this appeal is concerned.

9. The preamble to the Bill of Rights (1 Wm. & M, Sess. 2, c.2), which is agreed to be part of the law of New Zealand, recited "the late King … did endeavour to subvert … the laws and liberties of this kingdom … By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament". Article 9 of the Bill of Rights provides:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

While the meaning of this historic and important provision must not be whittled away, it is plain that it cannot be read entirely literally. As the Joint Committee on Parliamentary Privilege, of which Lord Nicholls of Birkenhead was the chairman, pointed out in its *Report* (Session 1998-1999, HL Paper 43-I, HC 214-I, paragraph 91),

> "To read the phrase ['place out of Parliament'] as meaning literally anywhere outside Parliament would be absurd. It would prevent the public and the media from freely discussing and criticising proceedings in Parliament. That cannot be right, and this meaning has never been suggested. Freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a healthy democracy as the freedom of members to discuss what they choose within Parliament."

As it is, parliamentary proceedings are televised and recorded. They are transcribed in *Hansard*. They are reported in the press, sometimes less fully than parliamentarians would wish. They form a staple of current affairs and news programmes on the radio and

television. They inform and stimulate public debate. All this is highly desirable, since the legislature is representative of the whole nation. Thus, as the Joint Committee observed in its executive summary (page 1):

> "This legal immunity is comprehensive and absolute. Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear."

In similar vein, Viscount Radcliffe, delivering the judgment of the Board in *Attorney-General of Ceylon v de Livera* [1963] AC 103, 120 ruled:

> "…. there is no doubt that the proper meaning of the words 'proceedings in Parliament' is influenced by the context in which they appear in article 9 of the Bill of Rights (1 Wm & M, Sess,. 2, c.2); but the answer given to that somewhat more limited question depends upon a very similar consideration, in what circumstances and in what situations is a member of the House exercising his 'real' or 'essential' function as a member? For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function."

10. Both sides accepted the decision of the Board in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, [1994] 3 NZLR 1, as an accurate and helpful exposition of the scope and purpose of article 9, although they drew rather different conclusions from it. The plaintiff, who had held ministerial office in the Government of New Zealand, sued the defendant broadcaster, complaining of statements made about him in a television programme which (he said) accused him of having conspired to sell state assets on unduly favourable terms with the object of procuring donations to a political party. In its defence the broadcaster pleaded justification, giving particulars which included statements made by the plaintiff and other ministers in the House of Representatives, said to be misleading and improperly motivated. The plaintiff applied to strike out those particulars as infringing article 9, and the main question in the appeal was whether that order had been properly made. Giving the judgment of the Board, Lord Browne-Wilkinson said ([1995] 1 AC 321, 332; [1994] 3 NZLR 1, 6-7):

> "*Article 9*

> If article 9 is looked at alone, the question is whether it would infringe the article to suggest that the statements made in the House were improper or the legislation procured in pursuance of the alleged conspiracy, as constituting impeachment or questioning of the freedom of speech of Parliament.
>
> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *British Railways Board v Pickin* [1974] AC 765; *Pepper v Hart* [1993] AC 593. As Blackstone said in his Commentaries, 17th ed (1830), vol 1, p 163:
>
> > '….the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'."

The Solicitor General placed reliance on this passage as highlighting the important constitutional principle that Parliament and the courts should not intrude into the sphere reserved to the other. He suggested that the Court of Appeal majority had somewhat neglected that principle, instead concentrating on the principle that Members of Parliament must enjoy untrammelled freedom of speech. On this aspect, referring to a decision of Hunt J in *R v Murphy* (1986) 64 ALR 498 in the New South Wales Supreme Court, Lord Browne-Wilkinson said ([1995] 1 AC 321, 333-334; [1994] 3 NZLR 1, 8):

> "Finally, Hunt J based himself on a narrow construction of article 9, derived from the historical context in which it was originally enacted. He correctly identified the mischief sought to be remedied in 1688 as being, inter alia, the assertion by the King's Courts of a right to hold a Member of Parliament criminally or legally liable for what he had done or said in Parliament. From this he deduced the principle that

> article 9 only applies to cases in which a court is being asked to expose the maker of the statement to legal liability for what he has said in Parliament. This view discounts the basic concept underlying art 9, viz the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.
>
> Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House; if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue."

Finally, Lord Browne-Wilkinson turned to the public policy or human rights issues which can give rise to conflict and said ([1995] 1 AC 321, 336-337; [1994] 3 NZLR 1, 10-11):

> "There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail. But the other two public interests cannot be ignored and Their Lordships will revert to them in considering the question of a stay of proceedings.
>
> For these reasons (which are in substance those of the courts below) their Lordships are of the view that parties to

litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists in New Zealand in relation to perjury under section 108 of the Crimes Act 1961. However, their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the House. In the past, Parliament used to assert a right, separate from the privilege of freedom of speech enshrined in article 9, to restrain publication of its proceedings. Formerly the procedure was to petition the House for leave to produce Hansard in court. Since 1980 this right has no longer been generally asserted by the United Kingdom Parliament and their Lordships understood from the Attorney-General that in practice the House of Representatives in New Zealand no longer asserts the right. A number of the authorities on the scope of article 9 betray some confusion between the right to prove the occurrence of Parliamentary events and the embargo on questioning their propriety. In particular, it is questionable whether *Rost v Edwards* [1990] 2 QB 460 was rightly decided.

Since there can no longer be any objection to the production of Hansard, the Attorney-General accepted (in Their Lordships' view rightly) that there could be no objection to the use of Hansard to prove what was done and said in Parliament as a matter of history. Similarly, he accepted that the fact that a statute had been passed is admissible in court proceedings. Thus, in the present action, there cannot be any objection to it being proved what the plaintiff or the Prime Minister said in the House (particulars 8.2.10 and 8.2.14) or that the State-Owned Enterprises Act 1986 was passed (particulars 8.4.1). It will be for the trial Judge to ensure that the proof of these historical facts is not used to suggest that the words were improperly spoken or the statute passed to achieve an improper purpose.

It is clear that, on the pleadings as they presently stand, the defendants intend to rely on these matters not purely as a matter of history but as part of the alleged conspiracy or its implementation. Therefore, in their Lordships' view, Smellie J was right to strike them out. But their Lordships wish to

> make it clear that if the defendants wish at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course."

11. It is apparent that the facts of *Prebble* were unlike those of the present case since in the struck out particulars reliance was placed only on statements in Parliament, from which adverse inferences were to be drawn. There was no extra-parliamentary repetition. Other reported cases are factually somewhat similar. Thus in *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 the plaintiff church sued the defendant, a Member of Parliament, for remarks made by the defendant in a television programme. He pleaded fair comment and the plaintiff replied with a plea of malice, relying on statements made in Parliament. The question arose at trial whether such reliance infringed article 9 and Browne J ruled that it did. The plaintiff could not ask the court to infer malice from statements made only in Parliament. The facts of *Hamilton v Al Fayed* [2001] 1 AC 395 were more complicated. The action was brought by a former Member of Parliament, complaining of allegations made by the defendant in a television interview, when he had accused the plaintiff of accepting money to ask questions in Parliament on the defendant's behalf. The defendant pleaded justification, but also applied to stay the action on the ground that it could not be fairly tried, since he could not refer to proceedings in Parliament to demonstrate the truth of his accusation. This application failed, because (and only because) section 13 of the Defamation Act 1996 enabled the plaintiff to waive the parliamentary privilege attaching to his utterances in Parliament. In his leading opinion in the House Lord Browne-Wilkinson referred to the earlier judgment in *Prebble* and said (at page 403):

> "It is in my judgment firmly established that courts are precluded from entertaining in any proceedings (whatever the issue which may be at stake in those proceedings) evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament. To mislead Parliament is itself a breach of the code of parliamentary behaviour and liable to be disciplined by Parliament: see *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 and *Pickin v British Railways Board* [1974] AC 765, 800, per Lord Simon of Glaisdale. For the courts to entertain a question whether

> Parliament had been deliberately misled would be for the courts to trespass within the area in which Parliament has exclusive jurisdiction."

Hyams v Peterson [1991] 3 NZLR 648 raised a number of points relevant to identification of the plaintiff, but none relevant to this appeal. Delivering the judgment of the Court of Appeal, Cooke P said (at page 656):

> "The point has nothing to do with the scope of parliamentary privilege. In *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, Browne J accepted that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arises out of something done outside the House. That was a case where support for an allegation of malice to refute a plea of fair comment was sought, unsuccessfully, from a reading of *Hansard*. The limits of the principle for which the case stands do not now arise for discussion. The plaintiff in the present case is not seeking to refer to any parliamentary proceedings, only to reports of parliamentary proceedings. In no way is the plaintiff, in the word used in the Bill of Rights 1688, 'questioning' what was said in Parliament. In no way does he seek, as Blackstone put it in a passage mentioned in the *Scientology* case, to have proceedings in Parliament 'examined, discussed and adjudged'."

12. The present case differs from those just considered both legally and factually. It is clear that at common law every republication of a libel is a new libel and a new cause of action. The republisher of the libel may or may not be the same as the original publisher. The republication may or may not be made on an occasion enjoying any privilege (whether absolute or qualified) attaching to an earlier publication or republication. It is further clear (see *Gatley on Libel and Slander*, 10th ed (2004), paragraph 6.33) that a defendant may be liable for republishing by reference to a statement originally published on another occasion by himself or another. Thus Mr Buchanan's claim in the present case is based not on what Mr Jennings said in the House on 9 December 1997 but on what he said to Mr Speden shortly before 18 February 1998, publication in the newspaper being the natural and foreseen consequence. The judge has found that on the latter occasion Mr Jennings republished by reference what he had said on the earlier occasion. There is no doubt at all that what Mr Jennings said in the

House was protected by absolute privilege. The question is whether that privilege extends to cover Mr Jennings' republication of that statement by reference outside the House.

13. It is common ground in this appeal that statements made outside Parliament are not protected by absolute privilege even if they simply repeat what was said therein. That proposition, established by *R v Abingdon* (1794) 1 Esp 226, 170 ER 337 and *R v Creevey* (1813) 1 M & S 273, 105 ER 102, was more recently applied by the High Court of Ontario in *Stopforth v Goyer* (1978) 87 DLR (3d) 373 and the Supreme Court of the United States in *Hutchinson v Proxmire* 443 US 111, 126 et seq (1979). In such a case there will inevitably be an inquiry at the trial into the honesty of what the defendant had said, and if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily, although not always, apply to the parliamentary statement also. But such an inquiry and such a conclusion are not precluded by article 9, because the plaintiff is founding his claim on the extra-parliamentary publication and not the parliamentary publication. The crucial distinction between such a case and the present, in the submission of the Solicitor General, is that Mr Jennings did not repeat his parliamentary statement, but confirmed it by reference only. Therefore it was necessary for Mr Buchanan to rely (as he did) on what Mr Jennings said in the House. That, it was said, infringed the protection afforded by article 9. In his dissent, Tipping J accepted this argument, which has received academic support in New Zealand: see Allan, *"Parliamentary Privilege: Will the Empire Strike Back?"* (2002) 20 NZ ULR 205; Joseph, *"Constitutional Law"* under the section headed "Parliamentary Privilege and Effective Repetition" [2003] NZ L Rev 387, 428ff; McGee *"The scope of parliamentary privilege"* [2004] NZLJ 84.

14. In the *Report of the Committee on Defamation* chaired by Faulks J (Cmnd 5909) (1975), paragraphs 204-205) this issue was briefly mentioned:

> "204. No parliamentary privilege attaches to the repetition outside Parliament of statements previously made in the course of Parliamentary proceedings.
>
> 205. The same principle must clearly apply to a member who verifies such a statement outside Parliament, for example, by saying 'every word I spoke in yesterday's Debate was true', or who in a statement outside Parliament

> extends a statement previously made in Parliament, for example, by saying 'Mr. X is a good example of the class of persons I criticised in Parliament yesterday'."

The report went on to discuss possible difficulties where a statement in Parliament is relied on to support a legal innuendo. The issue of republication by reference arose for decision in the Supreme Court of Victoria in *Beitzel v Crabb* [1992] 2 VR 121. The defendant, a Member of Parliament, had made very serious criticisms of the plaintiff in Parliament on 17 November 1989. In the course of a radio interview on 30 January 1990 he was asked about his remarks in Parliament and replied that he stood by what he had said. The plaintiff founded his claim on the defendant's confirmation on 30 January of what he had earlier said. The defendant relied on absolute privilege as a ground for striking out or staying the action. He was unsuccessful. Hampel J observed (at page 127):

> "The cause of action in this case lies in the publication by [the defendant] by adoption and repetition outside Parliament of words spoken by him in Parliament and published in the media.
>
> It is a well-established principle that members of Parliament may be held liable for afterwards publishing words spoken by them in Parliament, provided that the cause of action is founded on that subsequent publication ..."

At page 128 the judge continued:

> "Whether what is said outside Parliament amounts to a publication of defamatory words is a mixed question of fact and law. Although there is no direct authority on the question as to whether the words spoken by a member of Parliament in an interview and at a press conference constitute adoption and repetition of the words spoken in Parliament and hence amount to a publication of the defamatory allegations, there is authority consistent with such a proposition. In *Meurant v Raubenheimer* (1868) 1 Buch, AC 87 (Buchanan's Reports of the Appeal Court of the Supreme Court of the Cape of Good Hope), the seconding of a defamatory resolution proposed by another was held to constitute an adoption and repetition of the defamation. In *Spike v Golding* (1895) 27 NSR 379, a statement referring to a libellous article previously published and claiming that the publisher could prove the allegations in the first article was

held to constitute actionable republication. In *Griffiths v Lewis* (1845) 14 LJQB 197, it was held that if a person has uttered defamatory words of another, and subsequently on being asked whether he used those words, he says he did and says no more, any action for defamation must be on the words previously spoken. However, if the person who makes the statement goes further in response to the question and says he can prove the statement and repeats the words, he can, according to the decision in *Freeman v Poppe* (1905) 25 NZLR 529 be sued on the words so repeated.

It is undoubtedly arguable on the facts of this case that, despite the fact that the words previously spoken in Parliament were not subsequently repeated, there would be a sufficient temporal and substantive connection made by the listening public between the words spoken in Parliament by [the defendant] which were repeated in the media and the comments by him in the press conference and interview of 30 January 1990 for there to have been a defamatory publication by adoption by [the defendant] on that day.

It was of course strongly argued on behalf of the applicant that the plaintiff's claim was, on the pleadings, unsustainable, because it was founded on the words spoken in Parliament, which were absolutely privileged. In my view, however, the plaintiff's claim is founded on the publication by [the defendant] on 30 January 1990. Although this is not as clearly enunciated as it might have been, in this context I consider that paras 9 and 10 of the pleadings do indicate that this is the basis of the plaintiff's cause of action. As the plaintiff's cause of action lies in the publication by [the defendant] on 30 January 1990, a related issue may arise as to the extent to which, if any, *Hansard*, may be tendered to prove what was said by [the defendant] in Parliament on 17 November 1989. For the purposes of the application before me, however, I do not consider it necessary to decide this question."

15. The question arose again in the Queensland Court of Appeal in *Laurance v Katter* (1996) 141 ALR 447 another case in which a Member of Parliament had made allegedly defamatory remarks about the plaintiff in Parliament which he had (it was said) adopted and reaffirmed in radio and television interviews. The judgments in that case were largely directed to the constitutionality and meaning of section 16(3) of the Parliamentary Privileges Act 1987, and on

the latter question the opinion of Davies JA has since been doubted (see *Rann v Olsen* (2000) 76 SASR 450, 471, 495, 500 paras 111, 255, 283; *R v Theophanous* [2003] VSCA 78 at [69], 20 June 2003, Victoria Court of Appeal). In *Prebble* ([1995], 1 AC 321, 333; [1994] 3 NZLR 1, 8) the Board was of opinion that section 16(3) of the 1987 Act contained the true principle to be applied under article 9, but could not of course consider the difference of opinion which later arose. It does not, however, appear that these differences have extended to the statement of principle made by Davies JA (141 ALR 447, 490):

> "A more difficult question is whether reliance in this way on what the first defendant said in parliament impeaches or questions parliamentary proceedings, in particular whether it impairs the first defendant's freedom of speech in parliament. I do not think that it does. The first defendant was free to say what he did in Parliament.
>
> No impropriety is alleged against the first defendant in respect of what he said in parliament. What is alleged against him in the statement of claim is that what he said outside parliament was false and defamatory of the plaintiff. It is true that proof that what the first defendant said outside parliament was false will also prove that what he said in parliament was false. But that is because he incorporated the latter in his statements outside parliament. The privilege of Art 9 applies to the statements in parliament but not to the statements made out of parliament even though they incorporated by reference the statements made in parliament."

16. The Solicitor General expressly accepted in argument that there is no distinction to be drawn between the law of New Zealand and that of the United Kingdom so far as concerns the issue in this appeal. This makes it pertinent to refer again to the *Report of the Joint Committee on Parliamentary Privilege.* In paragraph 42 the Joint Committee said:

> "42. As a prelude, a practical point should be noted. The use of reports of debates in court proceedings was facilitated by the removal of a formal obstacle comparatively recently. From at least 1818 the practice in the House of Commons was that its debates and proceedings could not be referred to in court proceedings without the leave of the House. Petitions for leave were rarely refused, and in order to save parliamentary time the House decided in 1981 to discontinue

> the need for such leave. When doing so the House expressly re-affirmed the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights. The practice of requiring leave to refer to proceedings was never followed in the House of Lords. One effect of the 1981 change has been that the use of *Hansard* in court proceedings has increased. The oft quoted statement of Blackstone in his celebrated eighteenth century *Commentaries* that 'whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere' is now accepted as being too wide and sweeping."

In New Zealand, the Standing Orders of the House of Representatives (Standing Order 396(1)) provide that permission of the House is not required for reference to be made to proceedings in Parliament in any proceedings before a court. The Joint Committee found the development of the law in *Pepper v Hart* [1993] AC 593 to be unobjectionable (paragraph 45). It also considered the use of ministerial statements in Parliament in judicial review proceedings and said (paragraph 49):

> "49. Use of Hansard in this way has now occurred sufficiently often for the courts to regard it as established practice. Some examples will suffice as illustrations. In several cases challenges were made to the lawfulness of successive policy statements, announced in Parliament, regarding changes in the system for the parole of prisoners. In each case the court proceedings involved scrutinising the ministerial decisions and the explanations given by the minister in Parliament. In [*R v Secretary of State for the Home Department Ex p Brind* [1991] 1 AC 696] (broadcasting restrictions on terrorists) a ministerial statement in Parliament was used as evidence that the minister had exercised his power properly. In the Pergau Dam case [*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386] evidence given by the minister and an official to committees of the House of Commons was used in support of a successful claim that the decision to grant aid for the construction of the Pergau Dam in Malaysia did not accord with the enabling Act. In a criminal injuries compensation case, the Home Secretary announced in Parliament his decision not to bring into force the statutory compensation scheme but instead to introduce a tariff-based

> scheme under prerogative powers [*R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513]. In none of these cases does any argument seem to have been advanced, by the government or anyone else, about the admissibility in evidence or the use in court of the statements made in Parliament. Indeed, the practice in court is for both the applicants and the government to use the official reports of both Houses to indicate what is the government's policy in a particular area."

Thus it cannot now be said, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes article 9. In *A v United Kingdom* (2002) 36 EHRR 917, the European Court of Human Rights recorded (in paragraph 23):

> "Statements made by MPs outside the Houses of Parliament are subject to the ordinary laws of defamation and breach of confidence, save where they are protected by qualified privilege."

It went on to observe (in paragraph 84):

> "84. Furthermore, the immunity afforded to MPs in the United Kingdom appears to the Court to be in several respects narrower than that afforded to members of national legislatures in certain other signatory States and those afforded to Representative to the Parliamentary Assembly of the Council of Europe and Members of the European Parliament. In particular, the immunity attaches only to statements made in the course of parliamentary debates on the floor of the House of Commons or House of Lords. No immunity attaches to statements made outside Parliament, even if they amount to a repetition of statements made during the course of Parliamentary debates on matters of public interest. Nor does any immunity attach to an MP's press statements published prior to parliamentary debates, even if their contents are repeated subsequently in the debate itself."

17. These materials, in the opinion of the Board, point strongly towards the correctness of the conclusion reached by the majority of the Court of Appeal. But that conclusion must be tested for compliance with the principles which underlie the absolute privilege accorded to parliamentary statements. The right of Members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result is absolute, and must be

fully respected. But that right is not infringed if a member, having spoken his mind and in so doing defamed another person, thereafter chooses to repeat his statement outside Parliament. It may very well be that in such circumstances the member may have the protection of qualified privilege, but the paramount need to protect freedom of speech in Parliament does not require the extension of absolute privilege to protect such statements.

18. It is, again, an important principle that the legislature and the courts should not intrude into the spheres reserved to another. Thus if, as may happen, the absolute privilege of Parliament is abused, procedures exist both in New Zealand (Standing Orders of the House of Representatives, Orders 160-163) and in the United Kingdom (see *A v United Kingdom* (2002) 36 EHRR 917, paragraphs 27 and 86) to afford a remedy to a person defamed, and it is not the function of the court to provide one. In a case such as the present, however, reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member's behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament. The situation is analogous with that where a member repeats outside the House, in extenso, a statement previously made in the House. The claim will be directed solely to the extra-parliamentary republication, for which the parliamentary record will supply only the text.

19. The Board attaches importance, as the majority of the Court of Appeal did (paragraph [51]), to the fact that the non-privileged statement was made by Mr Jennings after the absolutely privileged statement in Parliament. In *Peters v Cushing* [1999] NZAR 241 the defendant defamed the plaintiff, but without naming or identifying him, in television interviews broadcast on 1 and 3 June 1992. His remarks excited considerable public interest and on 10 June 1992 he named the plaintiff in the House of Representatives. For his first cause of action based on these defamatory remarks the plaintiff could not succeed without relying on the naming of him in the House. This was held, rightly in the opinion of the Board, to be impermissible. For purposes of the action it must be assumed that the defendant's conduct was proper: if it was not, it was a matter for the House, not the court; and privilege is conferred for the benefit of Parliament as an institution, and of the nation as a whole, not for the benefit of any individual member. Thus the defendant had to be free to name the plaintiff in Parliament if he judged it right to do so, without fear of adverse civil consequences. Such a

case is however to be distinguished from a case such as the present where the extra-parliamentary confirmation followed the parliamentary publication.

20. In reaching the conclusion he did, Tipping J was oppressed by the difficulty of drawing a bright line and by the problems which would face parliamentarians if the rule he favoured were not adopted. The Board does not share his apprehension. A statement made in Parliament is absolutely privileged (and it is not necessary in this case to consider how far the definition of parliamentary proceedings may extend). A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a Member of Parliament is moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament. The Board conceives that this rule is well understood, as evidenced by the infrequency of cases on the point.

21. For these reasons, which are essentially those of the majority of the Court of Appeal, the Board will humbly advise Her Majesty that this appeal should be dismissed. The Board invites the parties, including the intervener, to make submissions on the costs of this appeal to the Board, in writing, within 42 days.