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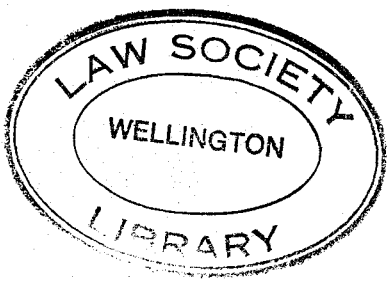
**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CP No. 109/98**




**BETWEEN** **ROGER ERIC WYNDHAM BUCHANAN**

Plaintiff

**AND** **OWEN ROBERT JENNINGS**

Defendant

**Date of Hearing:** 7 April 2000

**Date of Judgment:** 11 April 2000

**Counsel:** M.F. McClelland for Plaintiff
M.J. Sophocles and B.M. Cash for Defendant

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# JUDGMENT OF NEAZOR J

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**Solicitors:**
**Kensington Swan, Wellington for Plaintiff**
**Bell Gully Buddle Weir, Wellington for Defendant**

[1] This is an application for leave to appeal to the Court of Appeal under Rule 61C of the High Court Rules. Application was made to the Master to strike out the statement of claim. The original pleading had four causes of action founded in defamation. Master Thomson struck out two, but refused to strike out the other two. An application to review the Master's decision in respect of the remaining two was dismissed by Randerson J and me sitting as a Full Court. The present application is in respect of that decision.

[2] At the heart of the application to strike out is the absolute protection accorded to statements made by a Member of Parliament in the House of Representatives.

[3] The issue is succinctly stated in the Full Court Judgment:

> "[4] It is not in dispute that the alleged defamatory remarks made by the defendant in the House are protected by absolute privilege. Nor is it in dispute that if the same remarks had been repeated in the same or similar form outside the House, they would not be so protected. However, the plaintiff alleges that in the course of an interview by a reporter and in a letter to a newspaper, the defendant repeated or adopted the remarks made in the House by saying he did not resile from them but without actually repeating the words earlier used."

[4] The defendant contends that in the circumstances the privilege applies.

[5] To make clear the context of some of the argument on this application it is useful to set out conclusions reached in the judgment after discussion of judgments relating to the privilege of Parliament and the ambit of the defence it provides to individual Members:

> "[44] Although the expressions 'adoption by reference' and 'repetition' are frequently used interchangeably in this context, we prefer the terminology of 'effective repetition' because it better captures the rationale for denying the defence of privilege. Whether there has been an effective repetition is essentially a question of fact and degree. The whole of the circumstances will call for examination, including the remarks originally made in the House, the nature and context of the questions asked subsequently, and the defendant's response.
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> ...
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> All of this is background to the central question whether what has been said outside Parliament is properly to be regarded as a repetition of the statement protected by privilege. It is not enough to avoid the privilege that there be a reference outside Parliament to a statement inside the House: there must be sufficient to be a repetition of it. Otherwise, the proceeding is a challenge to a statement made inside the House.

> [45] In our view, while the remarks attributed to the defendant in response to *The Independent* reporter do not go as far as those in some of the cases discussed, we nevertheless consider there is an arguable case that the Parliamentary remarks have been effectively repeated outside the House."

[6] Counsel for the defendant placed emphasis on two heads of argument that the case was a proper one for further appeal:

(1) that the decision of the Full Court introduced a new concept of "effective repetition" into New Zealand law in this field which warranted consideration by the Court of Appeal before the case went to trial;

(2) that there is a conflict between that concept and the decision in *Prebble* v *Television New Zealand* [1994] 3 NZLR 1 as to whether a claim of defamation may be based on statements made in the House.

[7] Mr Sophocles submitted that the ambit of the concept of "effective repetition" has not previously been recognised as such in New Zealand, is uncertain, and applied to different fact situations could leave the application of Parliamentary privilege subject to fine and somewhat artificial distinctions; a situation which would undermine the important constitutional purpose of the privilege – freedom of speech in Parliament – which was supported by the Privy Council decision in *Prebble* v *Television New Zealand.* Further it was submitted that a Member saying outside the House that he "did not resile" from what he had said in the House ought not to be regarded as capable of being a repetition of what was said in the House, so that the plaintiff would necessarily be traversing not a statement made outside the House, but the statement made in the House. It was submitted that to accept that an action could proceed on such a basis would be contrary to, or would undermine, the *Prebble* decision because it would necessarily be allowing the truth of what was said in the House to be questioned elsewhere and used against the Member elsewhere.

[8] Mr Sophocles referred to a passage from the judgment of the Court of Appeal in *Peters* v *Cushing* [1994] 3 NZLR 30, 31 about a question whether parliamentary privilege provided a bar to a proceeding in respect of a statement made by a Member outside the House about a person in respect of whom identifying words were spoken inside the House. Cooke P said:

> "It is obviously seriously arguable – we need say no more – that the parliamentary identification is essential to the plaintiff's cause of action but is protected by parliamentary privilege. Otherwise a member's freedom of speech in Parliament might be said to be inhibited by apprehension that his or her remarks made inside the House might be linked with his or her remarks made outside the House in order to establish liability on the part of the member for defamation.
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> The question is of constitutional importance but can hardly be described as complex. It appears to be a question of law which could and should be determined before trial, for instance on the striking-out application."

[9] The comment indicates that it may be appropriate to test such an issue by an application to strike out, but that is not to say that the testing should continue through every possibility of appeal.

[10] Counsel did not differ on the criteria to be applied to such an application: - see eg *McGechan on Procedure* 3-111 HR61c.09:

> (1) whether there is a seriously arguable case for the Court of Appeal, i.e. in this case whether there is a real prospect that the claim will be struck out in that Court.
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> (2) if the case involves the application of reasonably well settled principles leave is unlikely to be appropriate; conversely if the case involves an area lacking in or devoid of guiding authority, leave is more likely to be granted;
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> (3) by analogy with cases involving a second appeal from a judgment of the District Court in civil matters, to warrant granting leave there must be a question of law, or possibly of fact, capable of bona fide and serious argument in a case involving some interest public or private, of sufficient importance to outweigh the delay and cost of a further appeal: *Rutherfurd* v *Waite* [1923] GLR 34 and *Waller* v *Hider* [1998] 1 NZLR 412 (CA), and *Green* v *Commissioner of Inland Revenue (No. 2)* [1991] 3 NZLR 14.
>
> (4) the guiding principle must be the requirements of justice.

[11] For the plaintiff Mr McClelland submitted that:

> (1) there is no new law in the judgments of the Master or the Full Court or a choice between lines of authority; simply a discussion of and application of the existing law to the pleadings in the context of an application to strike out;
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> (2) there is nothing in the case to point to the conclusion that the Court of Appeal would agree that the defendant had made out a case on the usual criteria for striking out the proceedings;

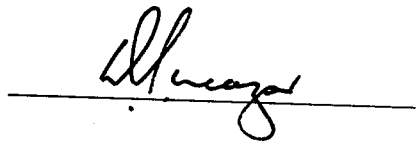
(3) trial of the matter is expected to be short, which would mean that the proceeding could be determined finally quite expeditiously in the Court of Appeal, if that was necessary, after the evidence has been heard;

(4) the Master and the Full Court were agreed in dismissing the application to strike out the two causes of action.

[12] In my view Mr McClelland is correct that there is no new law in the judgment of the Full Court. The expression "effective repetition" was on the face of the judgment not intended to introduce any new concept into the law; it was used to focus on the essential point of the existing law that whilst a statement protected by the privilege is always protected, if the plaintiff can show that the statement or its equivalent was also made in circumstances other than inside the House the privilege does not prevent the latter statement being sued on. *Prebble* v *Television New Zealand* is authority for the proposition that reports of statements in the House may be resorted to as a matter of history for the purpose of ascertaining the content of what is said to have been the statement outside the House. There can be, and the judgments have said there arguably is in this case, a factual issue whether what was said outside the House was a repetition of what was said inside so as to make the words examinable in Court as a non-privileged statement. The defendant's contention that the words used did not amount to a repetition may prove to be right, but that is not a reason for allowing a further appeal in respect of a strike-out application.

[13] The ambit of Parliamentary privilege always involves the public interest: the decision of the Privy Council in *Prebble* v *Television New Zealand* makes that plain, but in my view none of the criteria applied to such applications as the present warrants leave being given; on the contrary the justice of the case requires that a claim commenced in May 1998, based on words published between November 1997 and February 1998, should now be moving through the stages which will give a final result within a reasonable time, based on ascertained, not simply pleaded, facts. The

application for leave is refused. The plaintiff is entitled to costs. If counsel cannot agree on the amount they may file memoranda.



D.P. Neazor J