IN THE SUPREME COURT OF NEW ZEALAND

SC 11/2011
[2011] NZSC 106

BETWEEN	THE ATTORNEY-GENERAL First Appellant
AND	LINDSAY GOW Second Appellant
AND	ERIN ALICE LEIGH Respondent

Hearing: 16 August 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: J W Tizard and A J Connor for Appellants
J G Miles QC and S E Trafford for Respondent
J C Pike and P J Gunn for Speaker of the House of Representatives as Intervener

Judgment: 16 September 2011

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Tipping J)

Introduction

[1] In November 2007 the then Minister for the Environment, the Hon Trevor Mallard, was asked a written question for oral answer in the House of Representatives. To enable him to answer the question the Minister asked the Chief Executive of the Ministry for a briefing on the circumstances which had given rise to the question. The Chief Executive delegated that task to the second appellant,

Mr Gow, a Deputy Secretary. Mr Gow briefed the Minister both orally and in writing and the Minister used the information supplied to him to answer the parliamentary question. The respondent, Ms Leigh, issued proceedings in the High Court claiming on two causes of action that Mr Gow had defamed her both in what he had told the Minister orally and in what he had written in his briefing note. Mr Gow contended that his written and oral communications with the Minister had taken place on an occasion of absolute privilege and that the claim against him should on that account be struck out. Both the High Court[1] and the Court of Appeal[2] held that the occasion in question was an occasion of qualified rather than absolute privilege and that the claim could not therefore be struck out as barred by absolute privilege. The Attorney-General and Mr Gow appeal to this Court from the conclusion that the occasion on which Mr Gow communicated with the Minister was not one of absolute privilege. We would dismiss the appeal and uphold the decision of the Court of Appeal for the reasons which follow.

Absolute privilege

[2] Section 13(1) of the Defamation Act 1992 provides that proceedings in the House of Representatives are protected by absolute privilege.[3] This provision is consistent with art 9 of the Bill of Rights Act 1688, and the exclusive cognisance or jurisdiction rule which is largely the opposite side of the art 9 coin.[4] As Binnie J said, when writing for the Supreme Court of Canada in *Canada (House of Commons) v Vaid*,[5] the purpose of parliamentary privilege is to recognise Parliament's exclusive jurisdiction to deal with complaints within its privileged sphere of activity.

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1 *Leigh v The Attorney-General* HC Wellington CIV-2008-485-2315, 14 July 2009.

2 *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148.

3 This section is supplemented by s 242 of the Legislature Act 1908 which provides, in summary, that the House of Representatives and the Committees and members thereof shall have the same privileges as the House of Commons in England and its Committees and members had on 1 January 1865. Section 54 of the Defamation Act provides that nothing in that Act derogates from any of the privileges that were enjoyed by the House, its Committees and members immediately before its commencement .

4 See the judgment of Lord Rodger JSC in *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at [104] and the advice of the Privy Council in *Attorney-General of Ceylon v De Livera* [1963] AC 103 (PC) at 120 per Viscount Radcliffe.

5 *Canada (House of Commons) v Vaid* 2005 SCC 30, [2005] 1 SCR 667 at [4].

[3] Article 9 provides that "[t]he freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament". It is the words that are common to both art 9 and s 13 – "proceedings in Parliament/the House of Representatives" – that fall to be interpreted and applied in this case. Was the occasion on which Mr Gow communicated with the Minister such that it can validly be described as part of proceedings in Parliament?

[4] Things said for the purpose of conducting parliamentary business "within the walls of the House itself", as Lord Coleridge CJ put it in *Bradlaugh v Gosset*,[6] are said on an occasion of absolute privilege for the purposes of the law of defamation. But there can be occasions of absolute privilege in respect of matters that do not take place literally within the walls of the House of Representatives. The recent decision of the House of Lords in *Chaytor*[7] reflects the point. In that case members of the House of Commons and a member of the House of Lords were being prosecuted for submitting false expenses claims. They contended that either under art 9 or under the exclusive cognisance or jurisdiction rule they had absolute privilege and could not be prosecuted in the ordinary courts. In the course of his judgment rejecting that contention Lord Phillips PSC put the matter in this way:[8]

> [47] The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

[5] In *Vaid* the Supreme Court of Canada encapsulated the same general approach under what Binnie J described as the doctrine of necessity; that is, whether it is necessary for the proper and efficient conduct of the business of the House for the occasion in question to be classified as one of absolute privilege. As the *Vaid*

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6 *Bradlaugh v Gosset* (1884) 12 QBD 271 (QB) at 273.

7 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684.

8 With whom Lord Hope, Lady Hale, Lord Brown, Lord Mance, Lord Collins and Lord Kerr JJSC expressly agreed.

Court observed, it is appropriate to test a claim for absolute privilege against "the doctrine of necessity, which is the foundation of all parliamentary privilege".[9]

[6] It was established as long ago as 1839, when *Stockdale v Hansard*[10] was decided, that necessity is the rationale which underpins absolute privilege in respect of Parliamentary proceedings. In that case Patteson J said:[11]

> Where then is the necessity for this power? Privilege, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.

[7] This statement is also an early recognition of the need to balance claims for absolute privilege against the importance of preserving the ability of citizens to resort to the courts for redress, if their rights (here to reputation) are said to have been infringed. Where the claim for absolute privilege would result, if successful, in depriving citizens of their common law rights, the courts will be astute to ensure that the claimed absolute privilege is truly necessary for the proper and effective functioning of Parliament. In such circumstances the privilege must be necessary in the sense of essential, as McLachlin J put it in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*.[12] And, as the leading text *Erskine May* says,[13] absolute privilege exists when, without it, Parliament and its individual members could not discharge their functions.

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9 At [40].

10 *Stockdale v Hansard* (1839) 9 A & E l, 112 ER 1112 (QB). It was this decision that finally affirmed that Parliament is not the arbiter of the extent of its privileges. When that matter arises in litigation before the courts they must decide whether the occasion in question is covered by absolute privilege.

11 At 214, 1192.

12 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 387.

13 William McKay (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed, LexisNexis UK, London, 2004) at 75.

[8] The question in this case is therefore whether it is necessary for the proper and efficient functioning of the House of Representatives that the occasion on which Mr Gow communicated with the Minister be regarded as an occasion of absolute privilege. Has Mr Gow shown that without this kind of occasion being regarded as absolutely privileged the House could not discharge its functions properly?

[9] Mr Tizard, for the Attorney-General and Mr Gow, sought to place the principal emphasis on the closeness of the connection between the occasion in issue and the parliamentary proceeding to which it related. He emphasised that the Minister had an obligation to the House to respond to the question asked of him fully and with honesty and candour. He could only do so by obtaining the necessary information from the Ministry. He contended that on account of the closeness of this connection the occasion should be regarded as part of a proceeding in Parliament in which the question addressed to the Minister was asked and fell to be answered. While the closeness of the connection may well be relevant to the question of necessity it does not answer that question. As the earlier discussion has demonstrated, what matters is whether the asserted privilege is necessary for the proper and efficient functioning of the House and its members. Unless the necessity test is met there will be insufficient connection.

[10] Mr Pike, for the Speaker, submitted that the proper test was whether the occasion in question was reasonably incidental to the discharge of the business of the House. Mr Pike derived the concept of "reasonably incidental" from the language of s 16(2)(c) of the Parliamentary Privileges Act 1987 (Cth). That Act does not of course apply in New Zealand. In *Prebble v Television New Zealand Ltd*[14] Lord Browne-Wilkinson, writing for the Privy Council, said that s 16(3) of the Australian Act contained the true principle to be applied in that case.[15] His Lordship was there referring to subs (3), not to subs (2), upon which Mr Pike's submission was based. His Lordship had just referred to "[t]hat Act" (meaning the Australian Act) as declaring what had previously been regarded as the effect of art 9. His Lordship's reference to "that Act" can hardly have been meant, in context, to express the view that all of s 16 was a reflection of the common law. The focus was

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14 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

15 At 7 and 8 where the text of subs (3) is set out.

on subs (3). In the unlikely event that their Lordships did mean to say that s 16 as a whole reflected art 9 and the associated common law, we respectfully consider they went too far, notwithstanding the Australian Parliament's use of the words "[f]or the avoidance of doubt" in s 16(1).

[11] The concept of reasonable incidentality may be a relevant factor, but it is not, as we have seen, the ultimate question. It is hard to see how absolute privilege could be justified if there were no close connection between the occasion in question and the proper and efficient discharge of parliamentary business or if the occasion were not reasonably incidental thereto. But to show either of these circumstances is by no means sufficient to justify a claim for absolute privilege. We accept the submissions of Mr Miles QC, for the respondent, in this respect. A test based on the degree of connection or incidentality of the occasion to proceedings literally in Parliament would have an unsatisfactory degree of uncertainty. Necessity has a sharper focus and involves significantly less uncertainty than closeness of connection. Furthermore, any test involving less than necessity would impinge too much on common law rights. Necessity is therefore the appropriate test.

[12] We should add that in coming to this conclusion we have considered but cannot accept the conclusion reached in *Parliamentary Practice in New Zealand* by David McGee QC.[16] The learned author says that while necessity can help to elucidate the existence and extent of a particular privilege, it is not the legal foundation of parliamentary privilege in New Zealand.[17] That foundation, he says, has since 1865 been firmly rooted in New Zealand's own statute law.[18] It confers on the House of Representatives the privileges, powers and immunities already established at that time for the House of Commons of the Parliament of the United Kingdom. The author adds that whether a privilege exists and the definition of the scope of that privilege are questions of law to be determined by the court by reference to the statute rather than on any ground of necessity (though necessity may help to elucidate the statute).

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16 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005).

17 At 606.

18 Section 4 of the Parliamentary Privileges Act 1865; now s 242 of the Legislature Act 1908.

[13] With great respect to an acknowledged expert, we find this reasoning unpersuasive. The two statutes recognised parliamentary privilege in New Zealand as being the same as that existing in the United Kingdom at the time of their enactment. If, as we consider to be the case, necessity was and remains an essential underpinning and test for parliamentary privilege in the United Kingdom, it cannot be said that our statute requires some different test. To say that parliamentary privilege in New Zealand should be determined by reference to our statute rather than any ground of necessity presupposes that the statute dictates some other approach. Clearly it does not do so expressly. Indeed, its adoption of the United Kingdom approach supports rather than detracts from necessity being the test.

[14] Importantly, and in any event, the two statutes which received the United Kingdom approach into New Zealand law on their enactment do not have the effect of requiring that New Zealand continue to follow that law. The statutes were of reception only and cannot be regarded as having the effect of freezing the law or precluding such common law developments as are thought appropriate for New Zealand conditions.[19] As it happens, the approach which we consider appropriate in New Zealand is the same as that which prevails in both the United Kingdom and Canada.

The present case

[15] We move then to examine the circumstances of the present case against the necessity test. It is common ground, and rightly so, that occasions of the present kind are occasions of at least qualified privilege. The best way to address the issue in present circumstances is to ask whether it is necessary to afford to the type of occasion in issue more than qualified privilege.

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[19] See the discussion of a similar statutory provision in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [86]–[92], [122]–[125] and [204].

[16] Section 19 of the Defamation Act provides in respect of such occasions:

> **19 Rebuttal of qualified privilege—**
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> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
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> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[17] No extended discussion of the law of qualified privilege is required. In the broadest sense qualified privilege is based on occasions where the communication is made because the recipient has a right or need to know. Mr Gow has a defence to Ms Leigh's claim unless she can show he was predominantly motivated by ill will or otherwise took improper advantage of the occasion of his publications to the Minister. The question is whether it is necessary for the proper and efficient dispatch of the business of the House that he be protected against a claim for defamation even if he was indeed predominantly motivated by ill will or otherwise took improper advantage of the occasion.

[18] Mr Tizard suggested this was necessary because otherwise there was a risk of what he called a disjunct between what was said by the public servant to the Minister and what the latter said in the House. It would, he argued, be inimical to the proper functioning of the House, and a breach of art 9, for the courts to be able to investigate such a situation. In these circumstances the Minister would, of course, be protected by absolute privilege in respect of what was said in the House in answer to the parliamentary question. The issue is whether the public servant, or whoever else communicates information to the Minister, needs more than qualified privilege in order to enable the Minister, and the House as a whole, properly and efficiently to deal with parliamentary questions.

[19] We do not consider there is such a need. It cannot be conducive to the proper and efficient functioning of the House to give those communicating with a Minister in present circumstances a licence to speak with impunity when predominantly

motivated by ill will, nor a licence to take improper advantage of the occasion by using it for an improper purpose. It is very much in the interests of the proper functioning of the House that those communicating with a Minister in present circumstances, whoever they are, have a disincentive against giving vent to ill will or improper purpose. What use can it be to Parliament for those who are assisting Ministers to answer parliamentary questions to be motivated predominantly by ill will in doing so? That could only lead to a risk that Ministers might answer questions inaccurately.

[20] The duty of public servants to be candid will sometimes require them to advise in terms capable of bearing a defamatory meaning. But if they fairly draw attention to the basis on which they are doing so and mention any reservations they may have about the validity of what they are saying, they could not possibly be found to have lost their qualified privilege. That level of privilege gives ample protection to the public servant in circumstances like the present. If anything, giving greater protection would risk harming the proper and efficient conduct of parliamentary business.

[21] Mr Pike argued that unless absolute privilege were afforded for an occasion such as the present, its absence would have an undesirably chilling effect on what public servants said to Ministers. If the absence of absolute privilege chills any inclination of public servants to advise Ministers with ill will or otherwise to make improper use of the occasion, that would be no bad thing.[20] To the extent that any chilling effect may otherwise inhibit public servants we consider there are two answers. First, this seems inherently unlikely, and secondly, the risk is not such as to require the balance between vindication of reputations and absolute privilege to be struck in favour of the latter.

[22] It is significant that no material was put before the Court to suggest that limiting those in Mr Gow's shoes to qualified privilege has caused or would be likely to cause problems for the proper functioning of Parliament. If, as was postulated, people in Mr Gow's position find themselves having to defend a defamation suit by

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[20] As the Privy Council put it in *The Gleaner Co Ltd v Abrahams* [2003] UKPC 55, [2004] 1 AC 628 (PC) at [72].

saying that they did not tell the Minister what it might appear from his remarks in Parliament they had told him, the decision of the Privy Council in *Jennings v Buchanan*[21] suggests, by analogy, that this should not be regarded as precluded by art 9. But, whether that is so or not, the risk to this possible defence seems more theoretical than real. It does not persuade us that absolute privilege is necessary for occasions of the present kind.

[23] For these reasons we agree with the conclusion to which the Courts below came. The appeal should be dismissed. In view of the arrangements made between the parties costs should lie where they fall.

Solicitors:
Oakley Moran, Wellington for Appellants
Wilson Harle, Auckland for Respondent
Crown Law Office, Wellington for Intervener

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21 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.