

# PARLIAMENTARY PRIVILEGE IN NEW ZEALAND\*

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A recent New Zealand District Court judgment, in the case of *Cushing v Peters*,<sup>1</sup> raises the question of the extent of parliamentary privilege. The case is noteworthy because the judge relies on two earlier decisions, one from the Privy Council<sup>2</sup> and one from the New Zealand Court of Appeal,<sup>3</sup> to find that parliamentary privilege does *not* prevent a plaintiff in a defamation action from using a statement by a defendant MP made in the House. More precisely, the judge ruled that the statement could be used *to identify* the plaintiff, to establish to whom it was the MP was referring when he had earlier alleged, on television, that an influential but unnamed businessman had attempted to bribe him. The judge drew a distinction between 'questioning' or 'impeaching' an MP's parliamentary statement (which article 9 of the Bill of Rights 1688 absolutely prohibits) and merely relying on the report of it to identify the plaintiff and complete the defamation.

The relevant facts were these. In June of 1992 a government MP alleged on Australian television that he had been offered money (tied implicitly to policy concessions) for his re-election campaign by an unspecified member of the New Zealand Business Roundtable (that entity being comprised of a group of eminent and powerful business executives). The same allegation was made on New Zealand television shortly thereafter. In the House, a week later, the MP named the plaintiff as the person to whom he had been referring on television. The plaintiff then sued for defamation.

By the time of trial, the MP relied solely on parliamentary privilege as his only defence. All other defences had been dropped by then. The judge held that privilege did *not* prevent the statement in the House from being used to identify the plaintiff as the subject of the defamatory statement. He awarded the plaintiff the maximum damages available in the District Court of \$50,000. (Interestingly, the plaintiff chose to limit his claim to that amount in order to have his action remain in the District Court and hence to avoid the jury which would come with a trial in the High Court.)

The judge decided, as noted, that proving as a matter of historical record that an MP made a particular statement was permissible. What was impermissible was challenging or calling into question an MP's statement. Two authorities were relied on. In *Hyams v Peterson*,<sup>4</sup> the New Zealand Court of Appeal rejected the defendant's submission, "that a prior publication on a privileged occasion is not capable of being used to afford a link between an innocent (that is to say, non-actionable) publication and the plaintiff individually".<sup>5</sup> In other words, the Court of Appeal decided that, "the public naming of the plaintiff ... in reports enjoying qualified privilege

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1 No 1340/92, July 3, 1996, Judge Dalmer.

2 *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407.

3 *Hyams v Peterson* [1991] 3 NZLR 648.

4 See note 3 above.

5 *Ibid*, p 656 (per Cooke P for the Court).

of parliamentary proceedings enjoying absolute privilege”<sup>6</sup> did *not* debar the plaintiff from referring to those reports to show “that readers of later publications sued on would reasonably have understood them as referring to him”.<sup>7</sup>

The Court of Appeal in *Hyams* went on to state that this point “has nothing to do with the scope of parliamentary privilege”<sup>8</sup> and so to distinguish *Church of Scientology of California v Johnson-Smith*<sup>9</sup> as a case “where support for an allegation of malice to refute a plea of fair comment was sought, unsuccessfully, from a reading of *Hansard*”.<sup>10</sup> By contrast, said Cooke P, “the plaintiff in the present case is not seeking to refer to any parliamentary proceedings, only to reports of parliamentary proceedings”.<sup>11</sup> The test is whether the plaintiff is ‘questioning’ or indeed ‘examining, discussing or adjudging’, what was said in Parliament.

The Privy Council decision in *Prebble v Television New Zealand*<sup>12</sup> was the second case relied on by the District Court judge. He quoted a long passage from that Privy Council judgment as support for the proposition that there is a “fundamental distinction between reliance on matters spoken in the House for the purpose of calling those matters into question and merely wishing to prove that a statement has been made as a matter of fact”.<sup>13</sup> The most relevant portions of that passage from the Privy Council are these:

... their Lordships wish to make it clear that [having upheld the claim of parliamentary privilege here] does not exclude all references in court proceedings to what has taken place in the House ....

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 objections to the use of *Hansard* to prove what was done and said in Parliament as a matter of history ... 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 ... or that the State-Owned Enterprises Act 1986 was passed ....

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 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*.<sup>14</sup> (emphasis added)

These two cases, therefore, provided the judge in *Cushing v Peters* with what he thought was support for distinguishing between ‘calling into question’ and merely ‘proving what was said’. That distinction in turn was the basis for the judge’s rejection of the MP’s claim of parliamentary privilege. “The statement in the House is not questioned or challenged in the

6 Ibid.

7 Ibid.

8 Ibid.

9 [1972] 1 QB 522.

10 *Hyams v Peterson*, p 656.

11 Ibid.

12 See note 2 above.

13 *Cushing v Peters*, p 36.

14 *Prebble v Television New Zealand*, p 418.

slightest. It is simply relied upon as evidence of the surrounding public knowledge at or about the time the statements sued upon were made.”<sup>15</sup>

Did the judge get it right? Should a defamation action against an MP be allowed to proceed where the terms of a statement made in the House provide the only evidence of an essential element of the plaintiff's cause of action? Both these questions, in my view, should be answered in the negative.

To start, this much is clear. If the MP had made all of the offending comments (including naming the plaintiff) *outside* the House, then there would have been no issue raised about parliamentary privilege and (on the facts of this case) the MP would have been liable. Conversely, had all the offending comments been made *inside* the House, then the MP would assuredly have been absolutely protected by parliamentary privilege. The plaintiff, on this second hypothesis, could not have won his action.

What makes the *Cushing* case interesting is that its facts lie somewhere between these two clear-cut poles. The words spoken outside the House were *not* enough, on their own, to found a defamation action. They did not identify the plaintiff and identification is a necessary element of a *prima facie* case of defamation.<sup>16</sup> The fundamental issue at stake in *Cushing*, therefore, is the extent of the protection afforded by parliamentary privilege. Where does one draw the line when it comes to protecting MPs' freedom of speech in the House? More specifically, if an MP is fully protected when all his (otherwise defamatory) comments are made inside the House, what is the justification for his losing that protection as long as some of the pertinent comments are made in the House?

There are three grounds for rejecting the judge's decision as to the proper extent of the protection of privilege. Firstly, and most fundamentally, the basic premise underlying parliamentary privilege, of “ensur[ing] that the member ... at the time he speaks is not inhibited from stating fully and freely what he has to say”,<sup>17</sup> is evidently compromised by the *Cushing* decision. Secondly, the competing value implicitly preferred in this case, that of protecting individuals' reputations, can be largely achieved without this inroad into privilege. Finally, both the cases relied on by the judge can be read in a different way.

Let us start with the first and most important of these three grounds. This has to do with the whole purpose of parliamentary privilege which is to give MPs (and others in some circumstances) uninhibited freedom to speak their minds. The assumption is that such freedom will in the long run produce good consequences. The Privy Council in *Prebble* puts the rationale for a full-blooded privilege thusly:

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

<sup>15</sup> *Cushing v Peters*, p 48.

<sup>16</sup> See, for example, *Knuppfer v London Express* [1994] AC 116.

<sup>17</sup> *Prebble v Television New Zealand*, p 415 (emphasis in the original).

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.<sup>18</sup>

Were the *Cushing* decision to stand, no MP who had made unspecified allegations outside the House would be free to particularise those allegations inside the House. In some obvious circumstances, therefore, an MP *would* be inhibited from stating fully and freely what he or she has to say (eg naming some alleged briber). The MP would lack the confidence the privilege is designed to protect.

Such an inhibition, admittedly, may arguably seem no bad thing in the context of an MP making speculative, and often false, attacks on others' characters. But I leave my response to that until discussion of my second ground below. As far as the basic concept of an MP's freedom to speak is concerned, the judgment in *Cushing* clearly impinges on that freedom. There are now things a New Zealand MP states in the House at his or her peril. Worse, the rationale in *Cushing* is broad enough to inhibit and deter more than merely the malevolent (or even insouciant) caster of aspersions. Consider these two scenarios:

- (a) A particular MP has for years made scathing remarks, both inside and outside the House, about the moral turpitude of tax cheats. One day documents are sent to him detailing specific and highly complicated tax frauds by particular companies and individuals. Thinking he's acting in the public interest this MP tables these documents in the House.
- (b) A non-MP, worried about a supposed decline in the health care system, comments on television that doctors' salaries are the biggest single expense and that many doctors seem to be motivated purely by self-interest. This non-MP is careful not to name anyone. The next day an MP, in the House, names the ten highest paid doctors in the country and states that the non-MP told him these are the doctors to whom she was referring. Besides, the MP continues, everyone knows these are the doctors to whom she was referring.

In (a), the *Cushing* case would seem to allow a plaintiff to use the tabled documents for purely 'identification' purposes and so to establish a link between them and the preceding general statements. In (b), the *Cushing* ratio would seem to imply that a non-MP is at the mercy of an MP because the latter's "statement in the House ... is simply relied upon as evidence of the surrounding public knowledge at or about the time the statements sued upon were made".<sup>19</sup>

These scenarios illustrate how the *Cushing* rationale might produce undesirable outcomes. The flaw in the reasoning in that case, in my view, stems from trying to distinguish 'proving what was said' from 'calling into question'. More precisely, it is a weakness of the District Court judgment in *Cushing*, and indeed of the New Zealand Court of Appeal in *Hyams* and of the Privy Council in *Prebble*, that they are open to being read as assuming that 'proving what was said' can never amount to 'calling into question'. But in some circumstances that assumption is false.

The *Oxford English Dictionary* defines the verb 'to question' in two main ways. The first sense is of 'subjecting to examination' or 'seeking information from'. Were this the intended sense, the judge's ruling that the plaintiff was *not* questioning would mean that the plaintiff was *not* subjecting to examination or seeking information from the MP's statement,

<sup>18</sup> Ibid.

<sup>19</sup> *Cushing v Peters*, p 38. (See note 15 above.)

'X is the briber'. However, the plaintiff surely *is* seeking information from this statement. Indeed, the plaintiff's defamation case could not proceed without the information contained in this statement (because otherwise the plaintiff would not have been identified). So this cannot be the sense the judge had in mind.

The second dictionary sense of the verb 'to question' is of 'raising objections to' or 'calling into question'. At first glance, this second sense seems to allow the judge in *Cushing* to make his distinction between merely proving a statement was made (allowed) and questioning it (not allowed). After all, the Privy Council in *Prebble* said the plaintiff MP's statements in the House could be reproduced, there just could not be any suggestion or intimation that the MP had been lying or improperly motivated when speaking. The objection there, however, went to what had motivated the MP when he had spoken in the House. But what happens when the objection is not directly aimed at the speaker MP's motivation, *but at the mere fact the statement was made at all*? The gist of the gravamen in *Cushing* is not specifically that the MP was lying or prevaricating when speaking (as in *Prebble*), but rather that the MP spoke or uttered in the way he did - whether or not the MP was lying or prevaricating.<sup>20</sup>

When the objection goes to the very fact a statement was made, and not to the motivation behind it, the distinction between 'questioning' (as in 'raising objections to') and 'proving' collapses. An analogy to the hearsay rule may help make the point. Under the hearsay rule, statements sought to be introduced as evidence for the truth of what they assert are disallowed. But statements sought to be introduced simply as evidence for the fact they were made are allowed. There is a difference, in other words, between objecting to or calling into question the former and latter sorts of statements on the basis of the hearsay rule. Likewise, with privilege, there is a difference between objecting to or calling into question the truth or *bona fides* of a statement and objecting to the mere fact it was made. Turning back to *Cushing*, the plaintiff sought simply to show the statement had been made. It was the mere fact of having been made, evidently not the speaker's *bona fides*, that was objected to by the plaintiff. The background motivation of the speaker MP was irrelevant (save as to malice). What mattered, what was objected to and called into question, was the fact the statement in the House had been made at all.

If that be the case, and the situation is one in which what is objected to is simply *the very fact a statement was made*, then 'questioning an MP's statement' and 'proving an MP's statement' amount to the same thing. No distinction can be maintained because the questioning and objecting in this situation has to do with whether the statement was ever made, not with its truth. To prove the statement (via something said in the House) is to answer the question.

To recap, my first ground of objection to the *Cushing* decision is that it limits the freedom that parliamentary privilege affords to MPs. More specifically, it limits not simply cynical, maverick MPs, but also MPs who have made general comments outside the House in good faith and then find themselves wanting to make statements about individuals in the House. Worse, the distinction on which this limitation rests, between 'proving what was said' and 'calling it into question', dissolves in some circumstances. What circumstances? Precisely those circumstances in which part (or all) of

20 Honest mistake being no defence to a libel action.

an allegedly defamatory statement has been made in the House and objection is made simply to the fact it has been made, rather than to its truth or motivation. In those circumstances, questioning, objecting and proving amount to the same thing.

To restrict the coverage and protection of privilege to instances in which proceedings in Parliament have been ‘impeached’ or ‘questioned’ - whether one understands the notion of questioning in the judge’s narrower sense or in the broader sense I have just defended - is anyway debatable. As the Privy Council in *Prebble* notes, “In addition to art 9 [of the Bill of Rights 1688] itself, there is a long line of authority which supports a wider principle, of which art 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”.<sup>21</sup> The Privy Council then goes on to list some cases in support of this wider principle<sup>22</sup> as well as to cite Blackstone to the effect “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”.<sup>23</sup>

It might seem obvious, if one were to apply Blackstone’s maxim, that in instances in which a plaintiff can only win his defamation action by referring *in court* to what was said *in Parliament*, that those Parliamentary statements are necessarily being ‘adjudged’ (and only slightly less obvious that they are being ‘examined’). In *Cushing* the statement in Parliament amounted to this: ‘Cushing is the person to whom I was earlier referring on television.’ It was that statement that identified the plaintiff and completed the libel. To find for the plaintiff, as the judge did, necessarily involved the judge in ‘pronouncing on’ or ‘adjudicating upon’ or ‘awarding judicially because of’ that statement made in Parliament. All three *Oxford English Dictionary* senses of ‘adjudging’ seem to apply to what was done to the MP’s statement in the House, even the fourth archaic one of ‘condemning a person because of’.

Oddly enough the judge in *Cushing* implicitly asserts that he is *not* adjudging or examining the MP’s statement in the House by his citing with approval the passage from Blackstone. But even leaving Blackstone to one side, if the protection of privilege does not stem solely from Article 9 of the Bill of Rights 1688 (which itself, be it noted, was a codification of the common law), then the judge’s narrow focus on whether the plaintiff was questioning or impeaching the defendant MP’s statement in the House appears unwarranted.

My second ground for disagreeing with the *Cushing* judgment is that there are other ways to protect individuals’ reputations without having to make inroads into privilege and the uninhibited freedom it affords MPs. In any defamation action in which the issue of privilege is raised there are, in effect, two competing values at stake. One, that served by privilege, is the good consequences that are believed to flow from ensuring that there is a forum in which MPs can speak their minds completely uninhibited.<sup>24</sup> The other, that served by laws against defamation, is the value society places on allowing individuals to uphold their reputations against calumny. When two

21 *Prebble v Television New Zealand*, p 413.

22 *Ibid*. The cases cited include *Stockdale v Hansard* (1839) 9 Ad & El, *Bradlaugh v Gossett* (1884) 12 QBD 271 and *Pepper v Hart* [1993] 1 All ER 42.

23 *Prebble v Television New Zealand*, p 413.

24 I discuss this in the course of my first ground of disagreement from p 3 above.

values conflict, one must prevail. The judge in *Cushing*, on the facts of that case, preferred to allow the plaintiff to protect his reputation at the expense of allowing a small inroad into parliamentary privilege.

It is worth noting, in response, that Judge Dalmer's implicitly preferred value in *Cushing* is *not* the same as the Privy Council's. In *Prebble* the Privy Council appeared to say that the freedom underlying privilege should always be pre-eminent.

But the present case and *Wright's* case illustrate how public policy, or human rights, issues can conflict. 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.<sup>25</sup>

The case for preferring an untrammelled privilege is strengthened, moreover, once it is realised that the competing value can largely be upheld in other ways. Four of the new, recently adopted *Standing Orders*<sup>26</sup> in New Zealand give anyone who believes his reputation has been impugned under the cover of privilege an opportunity to apply to the Speaker to respond and also to request that that response be incorporated in the parliamentary record. Of course, without these new Standing Orders, any aggrieved person would be protected by qualified privilege in denying the allegations of an MP made under cover of parliamentary privilege.<sup>27</sup> This, though, simply allows a plaintiff like *Cushing* to deny the MP's allegations of bribery, not to deny them while also impugning the motives of the accusing MP. And the recent New Zealand Standing Orders do not change this much. Standing Order 163 (3) requires that:

Any response must be succinct and strictly relevant to the reference that was made. It must not contain anything offensive in character.

A more full-blooded right of reply, one which afforded protection to those who impugned the motives of accusing MPs, might be a further step worth considering. Given the publicity this right of reply would generate, it would not be an empty remedy against cynical, maverick MPs who deliberately and calculatingly abused the protections of privilege. To the extent it would still not be as full a remedy as a large defamation award, that is a price many - the Privy Council apparently included - are prepared to pay. That is because the medicine of limiting the protections afforded by parliamentary privilege is worse in the long run than the disease of a possible few cynical, manipulative MPs who are prepared to misuse privilege's protections. Let us depend on less corrosive medicines.

My third and final ground for rejecting the *Cushing* rationale is by now apparent. I do not accept the District Court judge's readings of the two cases he relies on, *Hyams* and *Prebble*. The *Hyams* case did not involve an MP as

<sup>25</sup> *Prebble v Television New Zealand*, p 471.

<sup>26</sup> See Standing Orders 163-166 of the New Zealand House of Representatives, adopted as part of the new set of Standing Orders in December 1995, all of which Standing Orders came into force on 20 February 1996.

<sup>27</sup> See *Gatley on Libel and Slander* (Sweet & Maxwell, 8<sup>th</sup> Edition, 1981) paragraphs 568 to 582. Interestingly, the judiciary in New Zealand has not gone as far as England's in protecting the scope one has to reply to allegations made against one on a privileged occasion. Compare *News Media v Finlay* [1970] NZLR 1089 and *Horrocks v Lowe* [1975] AC 135.

defendant or plaintiff. Nor did it involve a witness before a select committee or any other sort of proceeding in Parliament. *Hyams* involved a defamation proceeding against a Justice Department official who was investigating 'whitecollar' fraud. The defendant made allegations about a group of unnamed business people (the 'Gang of 20'). He prepared a memorandum for his superior reporting on his investigation and naming 29 people. The defendant then disclosed the memorandum to MPs and journalists. The memorandum was shortly thereafter tabled in Parliament and widely reported. The New Zealand Court of Appeal allowed in evidence a newspaper report of the tabled memorandum naming the persons to establish that the defendant's remarks about the 'Gang of 20' included reference to the plaintiff.

Whatever one thinks of the *Hyams* case, it in no way affected the freedom to speak of any MP nor did it limit the powers the legislature can exercise on behalf of its electors. It may have indirectly limited legislators' access to information, because non-MPs who have made unspecified allegations would be unwise in future to give documents naming specific individuals to an MP. But nothing in the case directly has "to do with the scope of parliamentary privilege",<sup>28</sup> as the Court of Appeal itself states. Hence any views about how to understand 'questioning' are clearly *obiter*.

As for the *Prebble* case, and the Privy Council's clear ruling that not all references to what has taken place in the House must be excluded in court proceedings,<sup>29</sup> it seems to me that the judge in *Cushing* has read too much into those comments. That not all references must be excluded does not imply that statements central to the success of a defamation action must be admitted. And while there was no objection to the defendants in *Prebble* alleging "the saying of certain words in Parliament without any accompanying allegation of impropriety or any *other* questioning",<sup>30</sup> that merely begs the question - so to speak - of whether proving a statement made in the House (one necessary to the success of a defamation action) is a form of questioning.

I believe it is. Moreover I do not see how the Privy Council could disagree without contradicting the other statements it made in *Prebble* about:

- (a) the important public interest privilege protects by ensuring MPs, at the time they speak, are not inhibited from stating fully and freely what they have to say;<sup>31</sup>
- (b) how any exceptions to this would mean MPs would not know whether or not there would subsequently be a challenge to what they say and so the confidence the privilege is designed to protect would be lost;<sup>32</sup>
- (c) the wider (than just article 9) parliamentary privilege principle that the courts will not allow any challenge to be made to what is said within the walls of Parliament in performance of its legislative functions and protection of its established privileges;<sup>33</sup> and
- (d) the pre-eminent value to be given to parliamentary privilege when it conflicts with other public rights and policies.<sup>34</sup>

Put bluntly, the judge in *Cushing* has taken certain comments of the Privy Council out of context. *Prebble* was a case in which an MP was the plaintiff

<sup>28</sup> *Hyams v Peterson*, p 656. See note 8 above.

<sup>29</sup> See note 14 above.

<sup>30</sup> *Prebble v Television New Zealand*, p 418 (emphasis mine). See note 14 above.

<sup>31</sup> See note 18 above.

<sup>32</sup> See note 18 above.

<sup>33</sup> See note 21 above.

<sup>34</sup> See note 25 above.



in a libel action and the defence involved an allegation that the MP had not been speaking honestly to the House. Ruling in those circumstances that the MP's statements themselves could be adduced - but without any suggestion, allegation or intimation that they had been improperly motivated - cannot, in my view, be used to support a general principle that identificatory statements by MPs in all situations can be adduced to prove they were made. After all, that reasoning would allow a plaintiff to adduce a defamatory statement made wholly in the House - since a plaintiff need make no allegations of improper motivation or lying. It is clear and uncontested, however, that privilege precludes proving a defamatory statement made wholly in the House. What is the justification, therefore, for privilege not also protecting the MP when only some of the pertinent comments are made in the House?

In my view, the District Court judge in *Cushing v Peters* got it wrong. The plaintiff should not have been able to rely on the defendant MP's statement made in the House. This may seem harsh in some few instances in which there is a suspicion that a cynical MP is knowingly abusing the protections of privilege. So be it. The alternative forces a blanket of circumspection on all MPs who have used the media to protest against unnamed individuals. No longer will the House provide them with a safe place to speak. In the long run, better consequences would follow from keeping unrestricted the protections of parliamentary privilege. Let us hope the defendant's appeal is successful.