Before there will be any real certainty as to the requirements of "fairness" in judicial and administrative decision-making many similar precedents will have to be established. Since this will take a considerable period of time, it is submitted that future uncertainty should be avoided by appropriate legislation in respect of those tribunals for which codes of procedure do not already exist. In establishing specific rules of procedure, or guide lines upon which a tribunal may institute its own procedure, Parliament would have to balance the individual's interest in the protection of his rights against the public interest in administrative efficiency and preserving informality (as far as possible) with respect to each tribunal.[28]

B. V. HARRIS

HORROCKS v. LOWE: SCOPE OF QUALIFIED PRIVILEGE REDEFINED

1. *The Decision*

It has long been assumed that two situations in which a defamatory allegation made on an occasion of qualified privilege will not be protected by the privilege are: (1) where the allegation is found not to be sufficiently relevant to the interest or duty which gives rise to the privileged occasion; and (2) when the publisher of the allegation is found to have been actuated by malice. In *Horrocks* v. *Lowe*[1] the House of Lords has denied the existence of the first of these situations as an independent ground for loss of qualified privilege, and has also suggested significant changes to the circumstances which justify a finding of malice.

In *Horrocks* v. *Lowe,* a town councillor brought a defamation action against a fellow councillor on the basis of a defamatory speech delivered at a Council meeting. The Town Council was divided into two political parties, the plaintiff being a member of the Conservative Party majority while the defendant was a Labour Party member. The Council had agreed to grant a ninety-nine year lease of Council land to the local conservative club which intended to build clubrooms on the site. Unfortunately the land could not be used for this purpose as it was subject to restrictive covenant, but this fact was not discovered until the clubrooms were half completed. The result was that work on the clubrooms had to be abandoned and compensation paid to the conservative club by the Council. The plaintiff was the Chairman of the Management and Finance Committee which was the committee handling this matter. He was also the Chairman and majority shareholder in a company which owned land benefiting from the restrictive covenants. The company had refused to release the

28 See K. C. Davis, *Discretionary Justice* (Louisiana State University Press, 1969) with respect to legislatures restricting the procedural discretion of administrative tribunals.

1 [1975] A.C. 135.

Council from the covenant because of promises that had been made to persons purchasing land from the company. The Labour Party members of the Council decided that the plaintiff should be attacked for his conduct in regard to the matter and that an effort should be made to remove him from the Management and Finance Committee. The defendant was chosen to make this attack and while doing so he made the defamatory allegations complained of.

At first instance the plaintiff succeeded in his action. Stirling J. held that although the speech had been made on an occasion of qualified privilege and the defendant had "believed and still believes that everything he said was true and justifiable", the defendant had been actuated by malice because his speech was so unfair and tendentious as to show that he had been motivated by "gross and unreasoning prejudice".[2] The Court of Appeal[3] reversed this decision. It held that the finding by the trial judge that the defendant honestly believed what he said to be true precluded a finding of malice.

In the House of Lords, the plaintiff argued that there are five sets of circumstances each of which may justify a finding of malice. Four of these circumstances may exist even although the publisher possesses an honest belief in the truth of the defamatory allegations. The most common of these circumstances is where the defendant was motivated by spite or ill-will, but this circumstance had been expressly excluded in this case. However the plaintiff submitted that one such circumstance was present on the facts of the case because although the defendant satisfied the honest belief requirement he was nevertheless actuated by malice because gross and unreasoning prejudice had so obsessed his mind that it had become completely closed to the truth. The result was that the defendant had believed the truth of the defamatory allegations because he wanted to do so.

The House of Lords unanimously rejected this proposition and refused to allow the appeal, holding that "gross and unreasoning prejudice" was only relevant where it results in the defendant being indifferent to the truth or falsity of the defamatory allegations and thereby prevents him having an honest belief in their truth.[4] Only two judgments were delivered. Viscount Dilhorne concentrated his attention on the plaintiff's submission and commented only that "Malice may be established in other ways than by showing that the defendant did not believe in the truth of what he said".[5] However Lord Diplock, in whose judgment the remaining members of the House[6] concurred, proceeded to restate the law relating to malice and the inclusion of irrelevant statements on a privileged occasion. It is Lord Diplock's judgment that will be examined here.

2. *Inclusion of Irrelevant Material in a Statement Made on a Privileged Occasion*

In *Adam* v. *Ward*[7] the House of Lords stated that whether a defamatory allegation is sufficiently related to the interest or duty which provides the foundation for the privileged occasion so as to

2 Relying on a dictum by Lord Esher M.R. in *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson* [1892] 1 Q.B. 431, 444.
3 [1972] 1 W.L.R. 1625.
4 [1975] A.C. 135, 145-146, 152.
5 Ibid., 146.
6 Lords Wilberforce, Hodson and Kilbrandon.
7 [1917] A.C. 309.

bring the allegation within the protection of the privilege is a question of law to be determined by the judge before the issue of malice is considered. If the allegation is not sufficiently related then it is not privileged, and therefore it is unnecessary to consider whether the defendant was motivated by malice in making the allegation. In discussing the test that the judge should apply in deciding the question of relevance their Lordships held that the privilege is not lost merely because the defamatory allegation was unnecessary, or because it does not satisfy a strict objective test of relevance.

The plaintiff in *Adam* v. *Ward* was a member of Parliament who had made a speech in the House of Commons referring to the case of an officer in his old regiment, who, he alleged, had been placed on half pay as a result of S. forwarding to his superiors confidential reports in respect of officers under his command which contained "wilful and deliberate misstatements of fact". Following this speech, S. referred the matter to the Army Council which investigated it and released a public letter which exonerated S. completely. The letter also stated that the plaintiff was one of the officers "removed from the regiment" and that S. had intervened to find the plaintiff another position when he was "called upon to retire from the service in consequence of adverse reports, which were duly communicated to him". It was argued that the Army Council's duty extended only to exonerating S. from the charges made, and because the references to the plaintiff exceeded this duty they were irrelevant and not privileged. The majority of the House of Lords[8] rejected this strict approach to the requirement of relevance. They held that it was relevant for the Army Council to point out that the plaintiff was not merely a disinterested bystander but had a personal interest in the matter, and it was also relevant for the Army Council to show that S. had not been biased against the plaintiff but had actually assisted him by finding him employment in an extra-regimental position. For these reasons the statements concerning the plaintiff were held to be protected by the privilege. However two different approaches were apparent from the judgments. Three of their Lordships approached the question of relevance by relating the defamatory allegations to the duty giving rise to the privileged occasion: Earl Loreburn took a narrow approach requiring the allegations to be both "relevant and pertinent" to this duty, while Lord Dunedin and Lord Shaw seemed to require only some small connection between the allegations and the duty. On the other hand, Lord Finlay L.C. and Lord Atkinson found the allegations to be privileged because they were relevant to the central facts of the situation from which the duty had arisen.

Decisions following *Adam* v. *Ward* have not been uniform in their approach to the question of irrelevancy. Although some courts have been prepared to include within the bounds of the privileged occasion all statements that are not totally unconnected with or irrelevant to the duty or interest creating it,[9] New Zealand Courts have tended to adopt a narrower approach.[10] It is clear that the inclusion of irrelevant

8 Although Earl Loreburn did not expressly dissent it is clear that he did not agree with the majority's conclusions: [1917] A.C. 309, 322.

9 E.g. *Netupsy* v. *Craig* [1973] S.C.R. 55, 60.

10 E.g. *News Media Ownership Ltd.* v. *Finlay* [1970] N.Z.L.R. 1089; *Dunford Publicity Studios Ltd.* v. *News Media Ownership Ltd. and Gordon* [1971] N.Z.L.R. 961.

material provides evidence of malice[11] and often judges have tended to avoid consideration of the independent question of irrelevancy by deferring it until after the jury have returned a verdict on the issue of malice.[12] As a finding of malice results in the loss of any privilege attracted by the occasion on which the communication was made, the adoption of this approach has meant that judges have seldom been required to make a decision on the independent question of irrelevancy.

In *Horrocks* v. *Lowe* Lord Diplock took a different approach to the effect of inclusion of irrelevant statements in a privileged communication. He said:

> As Lord Dunedin pointed out in *Adam* v. *Ward* [1917] A.C. 309, 326-327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true, or though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference.[13]

With respect, Lord Dunedin's judgment in *Adam* v. *Ward* does not support such an interpretation as he clearly distinguished the question of irrelevancy from the issue of malice. Lord Dunedin said:

> What test is to be applied? On the one hand, it is said that, the occasion being privileged, the whole document is privileged, but that if in the document you find parts which are not really necessary to the fulfilment of the particular duty or right which is the foundation of the privilege on the occasion, then these parts may be used as evidence of express malice. . . . On the other hand, it is said that it is not necessarily a question of malice at all; that privilege applies to what is written and published in response to a duty or right; and that if anything is found in the thing published which is not reasonably appropriate to that duty or right, then privilege cannot extend to that. My Lords, I think it will be found that in most cases these are merely two ways of expressing the same point. But there is this to be said in favour of the former method, that it is a formula which as a test will fit most if not all cases, whereas the second would necessarily break down in a good many. . . .
>
> My Lords, I have not said that the first test is universally applicable and for this reason: If the defamatory statement is quite unconnected with and irrelevant to the main statement which is ex hypothesi privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it . . .[14]

It is impossible to reconcile Lord Diplock's approach with *Adam* v. *Ward* for it was unanimously held in that case that the question of irrelevancy was a matter of law to be decided by the judge, while Lord Diplock treats the question as one of fact to be determined by the jury in deciding the question of malice. Applying *Adam* v. *Ward,*

11 *Knapp* v. *McLeod* [1926] 2 D.L.R. 1083, 1094.
12 This was the procedure adopted by Roper J. at the trial in *News Media Ownership Ltd.* v. *Finlay* [1970] N.Z.L.R. 1089.
13 [1975] A.C. 135, 151.
14 [1917] A.C. 309, 326-327.

it is possible that a communication containing two defamatory statements may result in statement A. being found to be irrelevant and therefore not privileged, while statement B. is sufficiently relevant and therefore protected by the privileged occasion. This result is not possible using Lord Diplock's approach because a finding of malice completely removes the protection of the privilege. According to Lord Diplock the result must be either that statement A. and statement B. are *both* protected by the privilege, or that *neither* is protected.

The problem recognised in *Adam* v. *Ward* and by Lord Diplock in *Horrocks* v. *Lowe* is that people making statements upon privileged occasions have difficulty in distinguishing between statements that are relevant and those which are not. In *Adam* v. *Ward* the bounds of the privileged occasion were extended to include statements which, although not strictly relevant, were at least connected in some way with the duty or interest that gave rise to the privileged occasion. Although the test was objective and applied by the judge, it was nevertheless liberal. Lord Diplock's approach replaces this objective test with a subjective test to be applied by the jury. This change has a direct effect upon the onus placed on the parties at the trial because although the defendant must still establish the existence of the privileged occasion, the defendant no longer has to prove that each defamatory statement is sufficiently relevant to fall within the bounds of the privileged occasion (the *Adam* v. *Ward* approach). Instead the whole communication is assumed to fall within these bounds and the plaintiff must prove that the defendant was actuated by malice in order to destroy the privilege. Although the inclusion of irrelevant allegations constitutes evidence of malice, Lord Diplock would have the jury directed that they should be slow to draw an inference of malice from such evidence.

The examination of two recent New Zealand cases demonstrates the practical consequences of Lord Diplock's suggested approach. In *News Media Ownership Ltd.* v. *Finlay*[15] the plaintiff was a member of Parliament who, in the course of a speech in Parliament, made a violent attack on a campaign by the newspaper *Truth* to reintroduce birching as a punishment for violent offenders, alleging that *Truth's* concern was "more with profits than with morals and with private advantage rather than the public good". In reply, *Truth* stated that as a noted Auckland lawyer the plaintiff had a very real material interest in preventing the introduction of birching. It suspected that the plaintiff was the one who was more concerned with profits, because no "thug" would want a lawyer to defend him once that lawyer had lost a client to the birch. In relation to the defence of qualified privilege, the Court of Appeal held that the statements complained of were not protected by the privileged occasion based upon *Truth's* interest in defending itself against the plaintiff's attack because:

> . . . privilege is lost if the reply becomes a counter attack raising allegations against the plaintiff which are unrelated or insufficiently related to the attack he made on the defendant. In other words he cannot claim the protection of privilege if he decides to bring fresh accusations against his adversary.[16]

The narrowness of this approach results from the importance that

15 [1970] N.Z.L.R. 1089.
16 [1970] N.Z.L.R. 1089, 1095, per North P.

the Court of Appeal attached to the attack itself, requiring the reply to be related to the attack rather than to the defendant's interest in defending itself against the allegations made against it. Had the House of Lords taken this approach in *Adam* v. *Ward* the plaintiff would probably have succeeded because his attack was concerned solely with the plight of one of the officers placed upon half pay and made no reference to the fact that he had a personal interest in the matter. The plaintiff in *Adam* v. *Ward* failed because the House of Lords were prepared to take a wider view requiring only that the reply have some relevance to the Army Council's duty to exonerate S. from the plaintiff's charges. Had such a view been take in *Finlay's* case it is submitted that the result may well have been different as it would have been considered relevant for *Truth* to point out that the plaintiff was not speaking only as an impartial member of Parliament but rather as one who had a professional, and therefore financial, relationship with the very people whom *Truth* wished to have punished by birching.

If Lord Diplock's approach had been applied in *Finlay's* case the plaintiff would have failed to prove his case. The issue of irrelevancy would not have been determined by the judge but would have been left to the jury merely as evidence of malice, and in fact the jury failed to reach agreement on the issue of malice.

Dunford Publicity Stuidos Ltd. v. *News Media Ownership Ltd. and Gordon*[17] also concerned the newspaper *Truth*. The Minister of Transport had at first endorsed a road safety competition but then, following inquiries made by *Truth,* had issued a press statement stating that he had made the endorsement without realising that the competition was a private commercial venture. *Truth* published two articles on the matter. The first consisted of the Minister's press statement together with necessary background information while the second, published the following week, attacked the honesty of the competition organisers in running the campaign. Macarthur J. held that the first article was privileged while the second article was not published on a privileged occasion. However, even if the privileged occasion protecting the first article extended to protect the second article, the statements concerning the honesty of the organisers in the conduct of the campaign constituted "irrelevant and foreign" material. If this occasion had been held privileged and Lord Diplock's approach adopted, the jury would have been instructed to consider whether *Truth* clearly must have realised that an attack on the organisers' honesty in conducting the campaign was irrelevant to the duty which *Truth* was found to possess, the duty being limited to informing the public that the Minister had been mistaken about the nature of the competition. As the Minister had made no reference at all to the conduct of the campaign, it is likely that the jury would have had little hesitation in finding that *Truth* must have realised that the second article was not necessary or relevant to the discharge of its duty, and had simply seized the opportunity to boost its sales by printing further defamatory material. In situations such as this, where the statement complained of is totally irrelevant to the privileged occasion, the adoption of either the *Adam* v. *Ward* approach or Lord Diplock's approach will usually produce the same result.

17 [1971] N.Z.L.R. 961.

Lord Diplock expresses the view that an objective test of relevance would render the protection afforded by qualified privilege illusory.[18] This is because a person making defamatory allegations on a privileged occasion will often be in an agitated or emotional state and therefore will not be in a position to make a completely rational judgement concerning the relevance of his allegations. In any event, laymen, unlike lawyers, have not had the advantage of years of legal training to help them distinguish relevant statements from those which are irrelevant.

3. *Proof of Malice*

If a plaintiff can prove that the defendant did not honestly believe what he said to be true, he will normally establish malice.[19] In order to prove lack of honest belief the plaintiff must show either that the defendant knew that the defamatory allegation was untrue, or that he was indifferent as to whether it was true or false. Occasionally the defendant will admit lack of an honest belief,[20] but usually the plaintiff will have to persuade the jury to draw an inference by showing that there are no grounds at all upon which a person could hold such an honest belief,[21] or that the defendant had deliberately closed his eyes to the facts or refrained from inquiring into them.[22] The plaintiff will not satisfy this burden merely by showing that the defendant's belief was unreasonable,[23] or the result of negligence,[24] or the product of gross and unreasoning prejudice. Lord Diplock declared:

> . . . the law must take [persons making statements upon privileged occasions] as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", this is, a positive belief that the conclusions they have reached are true. The law demands no more.[25]

Prior to *Horrocks* v. *Lowe* a defendant found to possess such an honest belief could still be found to have been actuated by malice if an improper motive (usually spite or ill-will was shown to be present. It had been held sufficient for the plaintiff to show the presence of an improper motive (usually spite or ill-will) was shown to be present. may also have influenced the defendant. Some restrictions did exist: juries were instructed that "no nice scales" were to be used in finding malice, and as hostility was often present (especially where the de-

18 [1975] A.C. 135, 151.
19 An exception exists where a defendant has a duty to pass on defamatory allegations without endorsing them in any way: *Stuart* v. *Bell* [1891] 2 Q.B. 341; *McKellar* v. *Brown* (1871) Mac. 905.
20 E g. *Saler* v. *Wehrman* [1934] S.A.S.R. 389 where the defendant was denying ever having made the defamatory allegation.
21 E.g. *Slipper* v. *Braisby* [1930] N.Z.L.R. 953.
22 *Webb* v. *Bloch* (1928) 4 C.L.R. 331, 953.
23 *Turner* v. *M.G.M. Pictures Ltd.* [1950] 1 All E.R. 449, 492.
24 *Brooks* v. *Muldoon* [1973] 1 N.Z.L.R. 1 (or even "gross negligence": *Lawrence* v. *Death* (1908) 28 N.Z.L.R. 620).
25 [1975] A.C. 135, 150.

fendant was replying to a personal attack), any hostility was required to be "operative" at the time that the defamatory allegation was made.[26] Nevertheless, it appeared that the existence of a single piece of evidence indicating malice to be present at the time the statement was made justified a jury reaching a finding of malice despite evidence that the defendant was also acting upon legitimate motives.[27]

Lord Diplock accepted that a defendant possessing an honest belief could be found to have been actuated by malice if he was actuated by spite or had used the occasion for any improper motive, including the securing of a private advantage. However, after noting that people usually act with mixed motives as they find it "difficult to hate the sin but love the sinner",[28] he expressed the view that in order to justify a finding of malice the improper motive must be the *dominant* motive. He continued:

> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. . . . It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.[29]

This is a significant departure from the previously recognised approach. Lord Diplock seems to be of the opinion that in order to justify a finding of malice where the defendant honestly believes the truth of his statement, not only must the improper motive be the *dominant* one which influenced the defendant but, in addition, there must be a finding that any legitimate motive played *no significant* part in his motives for publishing the statement.

4. *Conclusion*

It is to be hoped that New Zealand courts will adopt the views expressed by Lord Diplock in *Horrocks* v. *Lowe*. In regard to irrelevancy, it is submitted that Lord Diplock's view that inclusion of irrelevant defamatory allegations in a statement made on a privileged occasion merely constitutes evidence of malice in respect of the whole statement is preferable to the more restrictive approach taken in *Finlay's* case. In regard to malice itself, it seems that in the past juries have been too ready to find that a defendant who possessed an honest belief in the truth of his statement was nevertheless actuated by malice.[30] Lord Diplock's approach to the question of malice would ensure that juries are given precise instructions as to what justifies a finding of malice, and are cautioned against inferring malice except

26 *Muller* v. *Hatton* [1952] Q.S.R. 150.

27 *Turner* v. *M.G.M. Pictures Ltd.* [1950] 1 All E.R. 449, 455. E.g. *Winstanley* v. *Bampton* [1943] 1 All E.R. 661 where the defendant possessed two legitimate motives for writing the letter in question but was found to have been actuated by illwill towards the plaintiff and so was found to be actuated by malice.

28 [1975] A.C. 135, 151.

29 Ibid., 150-151.

30 An extreme example is furnished by *Brooks* v. *Muldoon* [1973] 1 N.Z.L.R. 1, where the jury's finding of malice was later set aside by the trial judge's ruling that no evidence of malice existed.

in the clearest cases. Adoption of the views expressed by Lord Diplock in *Horrocks* v. *Lowe* would provide more effective and realistic protection to persons making defamatory statements on occasions of qualified privilege.

L. A. Andersen

NEW ZEALAND FOREST PRODUCTS LTD. v. O'SULLIVAN

Introduction

The recent decision of Mahon J. in *New Zealand Forest Products Ltd.* v. *O'Sullivan*[1] involves a number of interesting and important aspects of liability for the escape of fire, including (1) the interest which the plaintiff must have in order to establish title to sue under the rule in *Rylands* v. *Fletcher*[2] (2) the scope of liability for pure economic loss (3) the relationship between the old common law action on the case for the escape of fire and the action based on *Rylands* v. *Fletcher*, and (4) the nature of the concept of non-natural user and its relationship with negligent use of land.

The respondent, O'Sullivan, was burning off scrub and bracken on his property during a closed fire season when the fire got out of control. He had obtained a permit under section 21 of the Forest and Rural Fires Act 1955 to carry out this activity, but the statutory provision does not remove civil liability in respect of the activity. The fire was lit when there was a light wind blowing but later in the day the wind shifted in direction and increased in velocity. The fire escaped from the respondent's land on to the adjoining land of Hutt Timber and Hardware Co. Ltd., the second appellant, which was covered in fern and bracken. Any further wind change would have sent the fire towards valuable pine forests owned by Hutt Timber and the adjoining landowners, New Zealand Forest Products Ltd. The Magistrate who heard the action at first instance found as a fact that at this stage the forests of both appellants were "menaced" by the fire. Both appellants sent employees to fight the fire. Eventually the fire was brought under control and the forests of both appellants were preserved intact. The only damage which resulted was the burning of several acres of fern and bracken on the land of Hutt Timber. However the appellants sought to recover the financial cost they had incurred in fighting the fire,[3] bringing their claims under the rule in *Rylands* v. *Fletcher*, negligence and nuisance.

1. *Standing to Sue*

First, Mahon J. considered whether the financial costs incurred by the appellants in averting the threat to their forests were capable in law of being recovered in an action under the rule in *Rylands* v. *Fletcher*. This initial problem raised two separate but closely related

1 [1974] 2 N.Z.L.R. 80.
2 (1866) L.R. 1 Ex. 265, affirmed (1868) L.R. 3 H.L. 330.
3 $1,898.40 by Forest Products and $64.42 by Hutt Timber.