ADVICE NO. 37

REFERENCE TO PARLIAMENTARY PROCEEDINGS IN DEFAMATION SUITS — COURT DECISIONS

The committee may be interested to hear of two recent court decisions relating to the question of whether parliamentary proceedings may be referred to, and, if so, to what effect, in the course of defamation proceedings relating to statements made outside parliamentary proceedings.

It is clear that the repetition outside of parliamentary proceedings of statements made in the course of those proceedings is not protected by parliamentary privilege. The question which arises is whether reference may be made to statements in parliamentary proceedings (protected statements) to establish the meaning or effect of statements made outside parliamentary proceedings (unprotected statements) to support a defamation action.

Such a course clearly involves using parliamentary proceedings to further a legal action against a person, and is therefore prohibited by the law of parliamentary privilege. The wording of section 16 of the *Parliamentary Privileges Act 1987* clearly prevents such a course, as it prohibits reference to parliamentary proceedings by way of, or for the purpose of,

> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

These provisions simply codify the pre-existing law of parliamentary privilege, and various judicial decisions have recognised that that is all the Act does.

While this may be crystal clear to us, certain judges do not find it so. The problem appears to arise from a deeply-ingrained view in the legal system that the law of defamation is a fundamental law, and that the right to sue for defamation is the most fundamental human right, and every other law must give way to it. There have been three cases in which courts have held that use may be made of protected statements to support an action in respect of unprotected statements. *Laurance v Katter* (1996) involved federal parliamentary proceedings but state defamation law, and was adjudicated by Queensland Supreme Court judges, two of whom appeared to hold that the Parliamentary Privileges Act had to be either read down or held invalid to allow the defamation law precedence; the case was settled before a final determination. *Beitzel v Crabb* (1992) was a Victorian case in which parliamentary statements were used to prove the defamatory meaning of unprotected statements; and *Buchanan v Jennings* (2002) was a New Zealand case to the same effect. The approach of the judges in these cases was expressly repudiated by others in other defamation cases in which the law was correctly applied, for example by the full South Australian Supreme Court in *Rann v Olsen* (2000).

The latest news is that the New Zealand case was taken to the Privy Council on appeal, and the appeal was dismissed earlier this month. The Judicial Committee of the Privy Council did not see that reference to a protected statement to further a defamation action involves using

parliamentary proceedings against a person in a manner prohibited by parliamentary privilege. Its judgment boiled down to nothing more than a reiteration of the principle that an unprotected statement is unprotected. Having gone to the highest court of appeal of the country, the New Zealand Parliament has nowhere else to go except to change the statutory law.

The other recent case occurred in Queensland, and is more complex because of the peculiar circumstances. The case involved a member of the nursing staff of a hospital, Ms Erglis, suing some of her colleagues (the nurses) and the state for statements made in a letter and apparently circulated by the nurses. Those statements responded to statements made by Ms Erglis to Opposition members who raised the content of her statements in the Legislative Assembly. The responsible minister read out in the Assembly and tabled a copy of the nurses' letter. The relationship between this copy and other circulated copies is not clear. The state applied to strike out part of the ground for Ms Erglis' action, which is that the tabling of the letter compounded the defamation by the nurses. The basis of the application was that parliamentary privilege attached to the tabling of the nurses' letter and its publication by the Legislative Assembly. There was also an argument that the letter was prepared for the minister to table, although there appears to be no evidence of this. A further difficulty is that some copies of the letter as circulated appear to be different from the tabled copy.

The application to strike out that part of the ground of action was successful, but Ms Erglis appealed to the Supreme Court sitting as the Court of Appeal, and her appeal was upheld earlier this month by a majority of two to one. In upholding the appeal the majority simply restored the ground of Ms Erglis' action, and did not of course adjudicate on its merits. The majority judgment, however, endorses the erroneous notion that reference may be made to parliamentary proceedings, the tabling of the letter, to further the action against the unprotected statements, in the letter as circulated. It goes further than the New Zealand judgment in allowing the parliamentary proceedings to be regarded as adding to the damage of the original publication.

The minority judge correctly held that referring to the minister's act of tabling the letter in Parliament for the purpose of furthering the defamation action necessarily involves questioning and impeaching the parliamentary proceedings, and that one consequence of the majority's finding would be:

> the potential detrimental effect on the willingness of citizens to provide possibly important and possibly defamatory information to members of Parliament … A Member of Parliament who is exposing a source of information to the risk of increased damages by merely publishing verbatim the information given, thus enabling civil proceedings to occur of the kind brought here … may be able to avoid that consequence to her or his informants by adding comment and observation from other asserted or actual sources and thus providing a bowdlerized or fragmented version of the information given … it will [then] be difficult for any person to tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication.

In other words, freedom of communication to Parliament and freedom of speech in Parliament are both infringed. Furthermore, the reasoning of the majority judgment collapses as soon as it is extended to the slightest variation of the facts. It also involves the absurdity of recognising the immunity of parliamentary proceedings when they are a primary publication, but allowing them to be questioned when they are merely a republication. The judgment represents a failure to apply properly the general principle of parliamentary privilege to the facts of the case.

It is not known whether the Queensland government will now apply to the High Court, or wait for the action to progress to see how the offending ground of Ms Erglis' action fares in the court proceedings. That part of the action may fail. The latter course, however, is dangerous, as an unfavourable result in the defamation action would be more difficult to overturn in the long run.

The judgment is another bad precedent weighing in the scales against the sound precedents, and it is to be hoped that it will not stand.

Further developments in this case will be awaited with interest, and I will keep the committee informed.