PARTIES:	TOYNE, Philip Howard
	v
	EVERINGHAM, Paul Anthony Edward
	AND
	JOHNSTON, Ross Andrew
	v
	EVERINGHAM, Paul Anthony Edward
JURISDICTION:	CIVIL
FILE NOS:	272/85 and 441/85
DELIVERED:	Darwin 29 July 1993
HEARING DATES:	16, 17, 18, 19, 20 September 1991, 30, 31 March 1992, 1 April 1992 and 11 June 1992
JUDGMENT OF:	ANGEL J

CATCHWORDS:

Defamation - Privilege - Qualified privilege - Statements made in respect of a duty or interest - Public interest - Need for reciprocity - Reciprocity of duty or interest not a universally necessary ingredient - Existence or absence of reciprocity of duty or interest is nevertheless a relevant factor to determine whether the occasion of publication is privileged

London Association for Protection of Trade v Greenlands Limited [1916] 2 AC 15, followed

Mowlds v Fergusson (1940) 64 CLR 206, followed

Toogood v Sprying (1834) 1 CR M & R 181, followed

Adam v Ward [1917] AC 309, referred to

Defamation - Privilege - Qualified privilege - Statements made in respect of a duty or interest - Public interest -

Allegations of public interest - Mere general public interest in publication not sufficient - Interest must not be vague or insubstantial - Ownership and control of Uluru and Katatjuta in the Federal and Territory elections of great interest to the public

Barbaro v Amalgamated Television Services Pty Ltd (1985) 1 NSWLR 30, applied

Hanrahan v Ainsworth (1990) 22 NSWLR 73, followed

Nationwide News Pty Ltd v Wiese (1990) 4 WAR 263, referred to

The Telegraph Newspaper Company Limited v Bedford (1934) 50 CLR 632, referred to

Truth (NZ) Ltd v Holloway [1960] 1 WLR 997 (PC), referred to

Defamation - Privilege - Qualified privilege - Public and controversial figures - Prior public criticism - Reputation already suffered - Whether criticism fair or justified irrelevant - Hostility a feature of political life

Cameron v Consolidated Press Limited [1940] SASR 372, approved

Dingle v Associated Newspapers Ltd [1964] AC 371, referred to

Defamation - Privilege - Qualified privilege - Statements made in respect of a duty or interest - Ministerial statements - Only protected when the circumstances justify

Morosi v Mirror Newspapers Ltd [1977] 2 NSWLR 749, followed

Defamation - Privilege - Qualified privilege - Statements made in respect of a duty or interest - What constitutes privileged occasion - Right of freedom of speech and right of reputation - Whether circumstances of publication justify the existence of privilege is a question of law

Adam v Ward [1917] AC 309, applied

Horrocks v Lowe [1975] AC 135, followed

London Association for Protection of Trade v Greenlands Limited [1916] 2 AC 15, followed

Defamation - Privilege - Qualified privilege - Rebuttal of privilege by malice - Evidence of malice - Apology - Prior

attitudes - Language used - Reckless indifference
Horrocks v Lowe [1975] AC 135, followed
Royal Aquarium and Summer and Winter Garden Society, Limited v Parkinson [1892] 1 QB 431, referred to

REPRESENTATION;

Counsel:

Plaintiff: G Watkins

Defendant: A J H Morris

Solicitors:

Plaintiff: Waters James McCormack

Defendant: Greves Creswick (NT)

Judgment Category Classification: A

Court Computer Code:

Judgment ID Number: ang93002

Number of pages: 48

ang93002

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 272/85
441/85

BETWEEN:

PHILLIP HOWARD TOYNE
Plaintiff

AND:

PAUL ANTHONY EDWARD EVERINGHAM
Defendant

AND:

ROSS ANDREW JOHNSTON
Plaintiff

AND:

PAUL ANTHONY EDWARD EVERINGHAM
Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 29 July 1993)

These are two actions for defamation arising from certain publications of the defendant in March 1985. The plaintiff, Philip Howard Toyne ("Toyne"), was at the time a barrister and solicitor of the Supreme Court of the Northern Territory and, inter alia, a legal adviser to the Mutitjulu community, an Aboriginal community located near Ayers Rock. The plaintiff, Ross Andrew Johnston ("Johnston"), was at the

time the community co-ordinator with the Mutitjulu community.

On Thursday, 14 March 1985, the defendant, the then Federal Member of Parliament for the Northern Territory, transmitted a document headed "Darwin Public Telex, 14 March 1985, 1.03pm - Statement by Paul Everingham, Federal Member for the N.T." to representatives of the media in Darwin and elsewhere throughout the States and Territories of Australia, containing the following words [annexure A to statement of claim]:

> "STATEMENT BY PAUL EVERINGHAM, FEDERAL MEMBER FOR THE N.T.
> THURSDAY, MARCH 14
> YESTERDAY'S SELL-OUT OF THE AUSTRALIAN NATION ON AYERS ROCK WAS MASTERMINDED BY A SMALL CLIQUE OF WHITE ADVISERS WHO HAVE BEEN CONNING SUCCESSIVE FEDERAL GOVERNMENTS AND THE NATIONAL PRESS FOR YEARS.
>
> PAUL EVERINGHAM, THE FEDERAL MEMBER FOR THE NORTHERN TERRITORY, SAID THIS IN RESPONSE TO YESTERDAY'S ANNOUNCEMENT BY ABORIGINAL AFFAIRS MINISTER, CLYDE HOLDING, THAT AYERS ROCK WILL BE LEASED FROM THE MUTITJULU COMMUNITY FOR APPROXIMATELY $100,000 A YEAR, AND THE TERRITORY GOVERNMENT WILL EFFECTIVELY BE CUT OUT OF ANY MANAGEMENT ROLE AT THE ROCK.
>
> MR EVERINGHAM SAID THAT YESTERDAY'S ANNOUNCEMENT BY MINISTER HOLDING SHOWED THAT LAND RIGHTS WAS TOTALLY OUT OF CONTROL IN AUSTRALIA.
>
> 'THE FEDERAL MINISTER PROUDLY ANNOUNCED THAT HE WAS TO HAND OVER TITLE AND CONTROL OF AUSTRALIA'S PREMIER TOURIST ATTRACTION TO A DISPARATE GROUP OF ABORIGINALS UNDER THE CONTROL OF A HANDFUL OF WHITE ADVISERS AND LAWYERS,' MR EVERINGHAM SAID.
>
> 'THIS NEW EUROPEAN ELITE OF THE LAND RIGHTS MOVEMENT CONTROL COMMUNICATIONS BETWEEN THE AYERS ROCK ABORIGINALS, THE FEDERAL AND TERRITORY GOVERNMENTS, THE PRESS AND THE AUSTRALIAN NATION IN GENERAL. AND THEY MANIPULATE THOSE ON BOTH ENDS OF THAT CONTROLLED COMMUNICATIONS SYSTEM.

'THIS MORNING'S ABC RADIO COVERAGE OF THE AYERS ROCK ISSUE ILLUSTRATES THE POINT. TO GET THE REACTION OF THE MUTITJULU COMMUNITY, THE ABC REPORTER HAD TO TALK TO A WHITE ADVISER. THESE SAME MANIPULATORS TRUCKED IN ABORIGINAL DEMONSTRATORS FROM THE W.A. BORDER TO GRANDSTAND IN FRONT OF THE NATIONAL PRESS GALLERY AND DEMAND OWNERSHIP OF AYERS ROCK FROM THE FORMER PRIME MINISTER, MALCOLM FRASER, WHEN HE OPENED THE CONNELLAN AIRPORT AT THE ROCK IN 1983. THE SIXTY OR SO LOCAL ABORIGINALS WERE TOO BUSY HAVING LUNCH WITH MR FRASER TO BE COERCED INTO DEMONSTRATING, SO THE RENT-A-CROWD PLAN WENT INTO ACTION TO PROVIDE HUMAN FODDER FOR THE MEDIA.'

MR EVERINGHAM SAID ABORIGINAL DIGNITY AND TRADITION WERE BEING TRAMPLED BY THE MANIPULATORS AND THEIR POLITICAL ALLIES, LED BY MINISTER HOLDING AND THE SOCIALIST LEFT IN VICTORIA.

'THE SO-CALLED TRADITIONAL OWNERS WHO WILL GET TITLE TO THE ROCK COME TO ULURU IN COMPARATIVELY RECENT TIMES, LURED BY THE AVAILABILITY OF PETROL, LIQUOR, FOOD AND FREE HOUSING,' MR EVERINGHAM SAID. 'THERE IS A BODY OF EVIDENCE TO SUGGEST THAT AYERS ROCK WAS NOT PERMANENTLY INHABITED BY ABORIGINALS FOR THE MOST PART OF THIS CENTURY. BUT TO MINISTER HOLDING AND HIS EUROPEAN PUPPET MASTERS IN CENTRAL AUSTRALIA, ONE ABORIGINAL IS THE SAME AS THE NEXT AS LONG AS HE OR SHE CAN SERVE A POLITICAL PURPOSE.'

MR EVERINGHAM SAID IT WAS INTERESTING TO SEE HOW QUICKLY ABORIGINAL ASPIRATIONS COULD BE TRAMPLED IN THE DIRT WHEN THEY CONFLICTED WITH THE POLITICAL AMBITIONS OF MR HOLDING AND HIS VICTORIAN POWER BROKERS.

LAST YEAR, THE TRADITIONAL OWNERS OF KAKADU AND THE NORTHERN LAND COUNCIL MADE IT VERY CLEAR THEY WANTED FURTHER URANIUM DEVELOPMENT ON THEIR LAND SO THEY COULD BUILD AND[SIC] ECONOMY WHICH WAS NOT DEPENDANT ON GOVERNMENT HANDOUTS. YET THESE WISHES WERE DISREGARDED AT THE ALP NATIONAL CONFERENCE, MAKING A MOCKERY OF ABORIGINAL SELF-DETERMINATION. YET THE FALSE TRIBE OF AYERS ROCK ARE HANDED TITLE TO AUSTRALIA'S PREMIER TOURIST ATTRACTION AS A REWARD FOR TOEING THE PARTY LINE. AND THEY WILL CONTINUE TO BE REGARDED AS TRADITIONAL OWNERS UNLESS THEY STEP OUT OF LINE, AT WHICH TIME THE EUROPEAN OVERLORDS OF AYERS ROCK WILL QUICKLY POINT OUT THAT THEIR REAL STATUS IS THAT OF POLITICAL PAWNS IN A VERY BIG GAME, IN WHICH THEY WILL PLAY NO PART IF THEY DON'T OBEY THE RULES.'

ENDS.....

NOTE - PAUL EVERINGHAM WILL BE AVAILABLE FOR VOICEPIECE/COMMENT ON THE ABOVE ON 089/279188 THIS AFTERNOON, AND LATER AT HOME ON 089/853846"

On the same day, the defendant was interviewed on ABC Radio in the Northern Territory and the following was published over the airways [annexure C to statement of claim]:

"NB The Territory's Federal Member, Paul Everingham, has responded to Mr Holding's announcement, saying that the deal is a disaster for the Territory. He's talking to Tony Walker.

TW Mr Everingham, in a press release this morning you've described the plan of management for Uluru as a total sellout of Territory interests and national interests. What do you mean there?

PE Well, its a sellout in the financial sense as I said in November December 1983 because more than ever the Territory Government and people's investment of $150 million in Yulara is placed in jeopardy.

TW Why is it in jeopardy?

PE Well we've got this so-called management committee of 6 Aboriginal people out there plus 5 others and the Aboriginal people at Ayers Rock are totally under the dominance of a couple of radical white advisers.

TW But the plan of management doesn't make any provision for ownership by white advisers.

PE Well these 6 Aboriginals I am saying to you, and I am quite happy to say it, will do exactly as the white advisers, Mr Toyne and Mr Johnson I think are their names, tell them.

TW Are you denying the right of those Aboriginal people down there to hire expert assistance though?

PE I'm not denying their right to hire it but unfortunately the expert assistance down there doesn't stop at giving advice. They insist on seeing that their advice is carried out at all costs.

TW Well, how is it going to cost the Territory money?

PE It is certainly going to cost the Territory money because we've seen the arbitrary and sort of capricious decisions, the outlandish decisions,

that these people, these white advisers, have made in the recent past.

TW What sort of decisions do you have in mind?

PE ... lifted the ban on the media so that Mr Holding's caravanserai could go through Ayers Rock.

TW Mr Everingham, Mr Holding points out that the plan of management is supposed to get around the tensions and the problems that have been existing between the Aborigines and various governments and tourist interests.

PE Well, I'd say that Mr Holding is selling a line of hogwash, its going to create more and more tensions, and why should Ayers Rock be owned by a small group of people. Ayers Rock belongs to all Australians and I'm going to continue fighting until Ayers Rock is returned to all Australians.

TW Don't you think that talk like that could keep the tensions going rather than reduce them?

PE I'm happy if it does keep the tensions going because most Australians believe that Ayers Rock Should be owned by the Crown, not by a small group of people who are manipulated by a couple of unscrupulous, radical, white advisers.

NB The Territory's Federal member, Paul Everingham."

Those words were broadcast by the Australian Broadcasting Corporation for reception by the general public over ABC Radio in the Northern Territory. The defendant spoke the words in the course of an interview for the program "Territory Extra" which he knew would be broadcast. No recording of this publication was put in evidence. There is only the text.

On Sunday, 17 March 1985, the defendant published the following words over radio station 8HA in Alice Springs [annexure B to statement of claim]:

"PAUL EVERINGHAM

Hello Listeners, this week I thought I should talk to you about what Mr Holding, the Minister for Aboriginal Affairs, calls 'the preferred national land rights model'.

I don't know why Mr Holding calls it the preferred model, because I haven't heard yet from anyone who actually prefers it. The Chairman of the National Aboriginal Conference, Mr Bob Riley doesn't prefer it; Territory land councils say they don't prefer it to the present Territory legislation; Mr Burke of Western Australia doesn't prefer it; and I'm pretty sure that there won't be any State Premiers of either political persuasion who would prefer it. According to Mr Hawke's statements in Western Australia just before the last election, he won't prefer it, and as you'd all be aware, the Australian Mining Industry Council definitely doesn't prefer it. In fact Jim Strong, the Executive Director of the Mining Industry Council, goes so far as to say that the model is totally unacceptable and unworkable, and indeed the Territory ALP doesn't even prefer it because this week, whilst Mr Holding was in Darwin, the Territory ALP said that his model was no good, that land rights should be left as they are in the Northern Territory, there should be no changes to the existing act and the right to veto mining, for instance should remain.

But I think we should look over the next few weeks at Mr Holding's preferred model to see whether it really will mean any improvement in the land rights situation in the Northern Territory. And I know most of you would agree with me that the Northern Territory, seemingly, couldn't be worse off. But couldn't we? Well, Mr Holding's preferred model, I think, still means no mining, and as you know, over the past three years, expenditure on mining exploration in the Territory has dropped from $35 million a year only three years ago to something like $11.8 million in the last financial year. That's a 200% drop in just two years. And, it allows under the preferred model, the so-called preferred model, ten years for more land claims and I think that period should be cut off, back to at the very most two years, and of course the so-called preferred model allows land claims in town areas. Now 28% of Alice Springs Urban Area has already been given by the Territory Government to Aboriginal groups in so-called needs claims, and yet, on top of that, Mr Holding's preferred model seems, as far as I understand it, to allow land claims in town areas as well. And lastly for this week, but perhaps most importantly, it opens the ambit of land claims very widely, because now if Mr Holding's model is adopted, Aborigines won't have to show traditional attachment

necessarily, they'll just have to show historical attachment. And that means probably in a legal interpretation something like no more than ten or twenty years' association with any particular piece of land.

But before I finish this week, I should say a few words about what's happened over Ayers Rock. Last week's announcement by Mr Holding of the give away of Ayers Rock was a sell-out of the Australian nation, that was masterminded by a small clique of white advisers who've been conning successive Federal Governments and the national press for years. This is obvious after the Minister for Aboriginal Affairs announced that the Mutitjulu Community will lease Ayers Rock back to the Australian Government for approximately $100,000 a year, and that the Territory Government will be effectively cut out of any management role at the Rock whatsoever. Last Thursday's announcement by Minister Holding showed, as far as I am concerned, that land rights is totally out of control. The Federal Minister proudly announced that he was to hand over title and control of Australia's premier tourist attraction to a disparate group of Aboriginals under the control of a handful of white advisers and lawyers. This new European elite of the land rights movement control communications between the Ayers Rock Aboriginals, the Federal and Territory Governments, the press, the media and the Australian nation in general. And they manipulate those on both ends of that controlled communication system. The ABC radio coverage of the Ayers Rock issue on Thursday morning illustrates the point. To get the reaction of the Mutitjulu community, the ABC reporter had to talk to a white adviser. These same manipulators trucked in Aboriginal demonstrators from the Western Australian border to grandstand in front of the national press gallery and demand ownership of the Rock from the former Prime Minister Malcolm Fraser, when he opened the Connellan Airport at the Rock in 1983. The sixty or so local Aboriginals were too busy having lunch with Mr Fraser to be coerced into demonstrating so the rent-a-crowd plan went into action to provide human fodder for the media cameras. Aboriginal dignity and tradition are being trampled by these manipulators and their political allies, led by Minister Holding and the socialist left in Victoria. The so-called traditional owners who'll get title to the Rock came to Uluru in comparatively recent times lured by the availability of petrol, food, liquor and free housing. There is evidence to suggest that Ayers Rock was not permanently inhabited by Aboriginals for at least the most part of this century, but to Minister Holding and his European puppet masters in Central Australia, one Aboriginal is the same as the next as long as he or she can serve a political purpose. It is interesting to see how quickly Aboriginal aspirations

> can be trampled in the dirt, though, when they conflict with the political ambitions of Mr Holding and his Victorian power brokers. Last year the traditional Aboriginal owners of Kakadu and the Northern Land Council made it very clear that they wanted more uranium development on their land so they could build an economy which was not dependant on Government handouts. Yet these wishes were disregarded at the ALP National Conference, making a mockery of Aboriginal self-determination. Yet the false tribe of Ayers Rock are handed title to Australia's premier tourist attraction as a reward for toeing the party line. And they will continue to be regarded as traditional owners unless they step out of line, at which time the European overlords of the Rock will quickly point out that their real status is that of political pawns in a very big game in which they'll play no part if they don't obey the rules.
>
> Thanks for listening and I'll look forward to speaking with you all again next week."

Again, only the text of the publication is in evidence.

In the edition of the Weekend Australian dated March 16-17, 1985 the following words were published:

> "Mr Everingham who is now the Federal Member for the Northern Territory, said: 'Most Australians believe Ayers Rock should be owned by the Crown and not by a small group of people who are manipulated by a couple of unscrupulous radical white advisers.'"

Each plaintiff claims the defendant responsible for that publication.

In relation to the first publication - the telex - each plaintiff says that from the natural and ordinary meaning of the publication complained of, there arose a number of defamatory imputations, first that each plaintiff had acted with gross impropriety in his respective position as legal adviser and community co-ordinator to the Mutitjulu

community by deliberately manipulating the Aboriginal people for his respective 'own party political purposes', contrary to the best interests of the Aboriginal people, secondly, that each plaintiff had preferred 'his own party political interests' to the Aboriginal people of whom he was an adviser, thirdly, that each plaintiff was not a fit person to advise the Aboriginal people, and, fourthly, that each plaintiff had deliberately participated in the deception of the Australian Federal Government, the Northern Territory Government and Aboriginal people to procure land rights for Ayers Rock for a group of Aboriginal people who had no claim to Ayers Rock. The plaintiffs' 'own party political purposes' were not identified in the evidence. The plaintiff Toyne also claims that a further defamatory innuendo was that he had behaved with gross impropriety as a barrister and solicitor because inter alia it was well known that he was a barrister and solicitor in Alice Springs at the time and that it was the duty of a barrister and solicitor not to place himself in a position where his duty and interest conflicted with the duty and interest of his clients, and further, it was the well known duty of a barrister and solicitor to observe good faith with his clients and not to deceive or mislead them.

The plaintiffs relied on similar innuendos from the other publications.

Each plaintiff claimed aggravated and punitive damages,

asserting that the defendant knew that each publication was false, or alternatively that it was published with reckless indifference as to whether or not it was true or false. The plaintiffs further said that each publication was a gratuitous and unwarranted attack on the plaintiffs which had the effect of damaging the plaintiffs and which was intended by the defendant to have that effect, and in particular in relation to the plaintiffs' respective professional activity and in relation to the Aboriginal people whom it was the plaintiffs' duty to advise, and in relation to negotiations with representatives of both the Northern Territory and Federal governments.

Although publication and identification were put in issue by the defendant on his defence, such matters were not seriously contested at trial, and indeed, the defendant who gave evidence admitted the publications related to each plaintiff. By his amended defence in the Toyne action, the defendant has pleaded that the matters complained of were published under qualified privilege and or alternatively was fair comment in respect of the public conduct of a person who takes part in public affairs and/or in respect of the character of such person so far as his character appears in that conduct. The defendant similarly pleaded in the Johnston action, but in addition said that the matters complained of were published under such circumstances that Johnston was not likely to suffer harm. Such a plea may be good elsewhere, but it is unknown to the Territory. Each

plaintiff met these defences with a plea of express malice, such being particularised as follows:

> "(1) The Defendant did not have any honest belief in the truth of the matters complained of or any of them, so far as they convey each of the imputations alleged.
>
> (2) The Defendant published each of the matters complained of knowing it was false, so far as it conveys each of the imputations alleged, or, alternatively, with reckless indifference as to whether or not it was true or false, so far as it conveyed each of the imputations alleged.
>
> (3) The matters complained of and each of them, so far as they concerned the Plaintiff, were irrelevant to any occasion of qualified privilege.
>
> (4) The matters complained of and each of them were a gratuitous and unwarranted attack on the Plaintiff.
>
> (5) The matters complained of and each of them were published by the Defendant with an improper motive and purpose namely:
>
> (i) to damage the Plaintiff in relation to his professional activities, and in relation to the Aboriginal people generally, and in relation to negotiations with representatives of State and Federal Governments;
>
> (ii) to attach[sic] the Plaintiff for the Party Political purposes of the Defendant
>
> (6) The language of each of the matters complained of, so far as they concern the Plaintiff is and was extravagane[sic] and unnecessary, abusive and malicious."

Toyne completed a Law Degree at Melbourne University in 1970. In that year he travelled to the Northern Territory. He returned home to Melbourne and completed a Diploma of Education. In 1973, he became a teacher at Haasts Bluff

west of Alice Springs. He became interested in Aboriginal affairs. In 1974 he returned to Melbourne to complete his articles and became a solicitor for the Central Aboriginal Legal Aid Service in Alice Springs in 1975. In 1977 he was seconded to the Central Land Council as junior counsel in a Walpri land claim. In December 1978 he became involved in the claim to the area surrounding Ayers Rock. In February 1979 that claim was amended to include the Ayers Rock area. He appeared as counsel before the Toohey Commission on behalf of the Pitjantjatjara Council Inc. In 1979 he was appointed as legal adviser for the Pitjantjatjara Council, a position he retained until 1982. In 1982 he commenced practice as a sole practitioner doing consultancy work for Pitjantjatjara Council. He also acted as a legal adviser to the Mutitjulu community at Ayers Rock.

Johnston grew up on a grazing property in western New South Wales. He obtained a Diploma of Agriculture at Yanco Agricultural College in New South Wales. In the years 1968 to 1970 he was a jackeroo and station overseer on Wyembri Station in Western Australia. Having done National Service with the Army, commencing in 1970, he worked with the New South Wales National Parks and Wildlife Service as a ranger in New South Wales. He spent six months at the Kuringai Chase National Park, and two years as officer-in-charge of a district in western New South Wales. In the years 1977 to 1980 he worked with the Western Australian Museum and did work as ranger-in-charge of the Woodstock Abydos Reserve.

In the years 1980 to 1983 he worked as manager of seven pastoral properties under Aboriginal ownership in Western Australia. He became an adviser to the Mutitjulu Community in January 1984, the position he held at the time of the matters complained of. After the formal handing over of Ayers Rock in October 1985 Johnston worked as Park liaison officer for the Uluru Board of Management.

The publications complained of had a somewhat complex background.

On 1 December 1978, the Central Land Council lodged a claim under the Aboriginal Land Rights (NT) Act 1976 entitled "Lake Amadeus/Luritja Land Claim" to an area of unaliented Crown land southwest of Alice Springs. It was lodged on behalf of claimants described as belonging to the Yunkantjatjara, Pitjantjatjara and Matuntara linguistic groups; fourteen persons were named. On 19 February 1979, the claim was amended and described as the "Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim". Significantly it added an area known as the Uluru (Ayers Rock/Mt Olga) National Park including the proposed Yulara Village site.

Amongst others, the Northern Territory Government, of which the defendant was then Chief Minister, was a party before Land Commissioner Toohey. As already related, Toyne appeared as the legal representative for the Pitjantjatjara

Council Inc., a body formed by the Pitjantjatjara and related peoples of the Northern Territory, Western Australia and South Australia with the objective of securing title to land for Aboriginal communities within central Australia.

The hearing commenced in Alice Springs on 2 April 1979 and submissions were initially heard dealing with questions of jurisdiction. On 4 April 1979, Commissioner Toohey ruled that the area of national park was not unaliented Crown land and so was not available to be claimed pursuant to the Act. It is appropriate to set forth his reasons in so ruling because they succinctly state the legal status of Uluru prior to the "hand back", the subject of the defamatory remarks giving rise to the present actions.

Commissioner Toohey said:

> "By proclamation of 23 January 1958 (*Commonwealth of Australia Gazette* of 20 February 1958 - Exhibit 4), the Governor-General reserved an area of land for the purpose of a national park to be known as Reserve Number 1012, Ayers Rock - Mount Olga National Park. That was a reservation of Crown land made pursuant to s.103 of the *Crown Lands Ordinance* 1931.
>
> Submissions were made on the assumption that the area involved was identical with the present park. The Surveyor-General's letter of 8 March 1979 (Exhibit 1) suggests that this assumption is not entirely correct but nothing seems to turn on any difference.
>
> The *Northern Territory Government Gazette* of 26 March 1958 (Exhibit 5) contained a notification that, by virtue of powers conferred by s.13 of the *National Parks and Gardens Ordinance* 1955, the Administrator committed to the care, control and management of the Northern Territory Reserves Board the land reserved by the proclamation of 23 January 1958.
>
> On 10 May 1977, the Administrator revoked that notice.

See *Northern Territory Government Gazette* of 23 May 1977 (Exhibit 6).

Two years earlier the *National Parks and Wildlife Conservation Act* 1975 ('the National Parks Act') became law. By s.7(2) of that Act the Governor-General was empowered to declare, by proclamation, an area to be a park or reserve.

On 24 May 1977, one day after publication of the revocation of the notice giving to the Reserves Board care, control and management of the Park, there was published in the Australian Government Gazette (Exhibit 2) a declaration that the area specified in the schedule attached be a park with the name 'Uluru (Ayers Rock - Mount Olga) National Park'. That land is shown on Exhibit 1A.

The effect of that declaration was to vest the Park in the Director of National Parks and Wildlife (National Parks Act s.7(7)).

In the following year the Self-government Act was passed. It came into operation on 1 July 1978 save as to ss.1, 2 and 70 which became effective on 22 June 1978, the day the Act received the Royal Assent.

Section 69(2) of that Act vested all interests of the Commonwealth in land in the Territory, with some exceptions not relevant here, in the Territory.

Section 70 empowered the Commonwealth, by using the procedure laid down in the section, to acquire for a public purpose any land vested or to be vested in the Territory by s.69(2).

By a notice dated 27 June 1978 and published in the *Commonwealth of Australia Gazette* of 29 June 1978 (Exhibit 3), the Commonwealth purported to acquire from the Territory an area of land for the public purpose of a national park. The area included not only the land referred to earlier as the Uluru (Ayers Rock - Mount Olga) National Park but also the Sedimentaries. I say 'purported to acquire' because a question has arisen as to the validity of the acquisition and its implications.

Against that background I turn to the operation of the Land Rights Act and the status of the Park. The relevant definitions have been mentioned already.

Immediately before the notice of 27 June 1978 the Park was vested in the Director of National Parks and Wildlife. In the submission of the Solicitor-General, Mr Barker Q.C., the land was neither Crown land nor was it unalienated Crown land. It was not Crown land

because the vesting in the Director effected an alienation from the Crown of an estate in fee simple and also it was land set apart for a public purpose under the National Parks Act. If it was held to be Crown land, it was not unalienated because a person other than the Crown, viz. the Director, had an estate or interest in it.

In my view this submission, which was supported by senior counsel for the Commonwealth, Mr Denton Q.C., and counsel assisting, Mr Hiley, must be upheld. Indeed Mr Laurie Q.C., senior counsel for the claimants, had no answer to it, describing it as an insuperable hurdle for his clients.

Because it is a matter of jurisdiction I should say briefly why I agree with it.

Section 7(7) of the National Parks Act operates to divest the Crown of its right, title and interest and to vest it in the Director. There is nothing in the National Parks Act to warrant a conclusion that the director holds the land on behalf of, as agent for or in trust for the Crown. The Act itself, in several places, distinguishes between the Commonwealth and the Director. See for instance ss.7(7), (7A) and (10), 8 B and 9(3). The Director is a corporation with perpetual succession (s.15(1)), with power to acquire, hold and dispose of real or personal property (s.17(d)). The Act establishes an Australian National Parks and Wildlife Fund, vested in the Director (s.45).

These considerations are not exhaustive but they are sufficient to justify the conclusion that the whole purpose and effect of a proclamation under s.7(2) of the National Parks Act is to turn Crown land into something else, land the property of the Director. See *Launceston Corporation v The Hydro-Electric Commission* (1959) 100 CLR 654 at p.658 and the decisions referred to in the judgment of the court, also *State Electricity Commission of Victoria v City of South Melbourne* (1968) 118 CLR 504 at p.510.

Strictly this makes it unnecessary to decide whether the effect of a proclamation under the National Parks Act is to set land apart for or dedicate it to a public purpose. I would however say this. There can be little doubt that if land is set aside for a national park it is for a public purpose. See *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at p.88 and s.11(8) para. (a) of the National Parks Act. And if, for some reason, a proclamation under the National Parks Act did not divest the Crown of legal title to the land concerned, it had the effect of setting it aside for a public purpose viz. a national park. See *Williams v Attorney-General for New South Wales* (1913)

16 CLR 404 at p.440.

> I return now to the notice of 27 June 1978. It is unnecessary, so far as the National Park is concerned, to spend time on the validity of the notice; I shall say something about that in regard to the Sedimentaries. If the notice was ineffective, the land within the Park remained vested in the Director. If it was effective and thereby the Commonwealth acquired the land, s.7(7A) of the National Parks Act operated to vest it in the Director. In either case the land does not answer the description of unalienated Crown land."

There was evidence before Commissioner Toohey to the effect that the Pitjantjatjara people had little historic association with Uluru and were not traditional owners thereof. Evidence to that effect was contained in a report "Ayers Rock and Winbarku. A critical examination (of CP Mountford)" by Professor T G H Strehlow, which is exhibit D34 before me.

Toyne included amongst his roles legal adviser to the Pitjantjatjara Council Inc and was instrumental in the passing of the 1981 South Australian Pitjantjatjara Land legislation effecting a transfer of tracts of land in the northwest of South Australia to the Pitjantjatjara people.

In 1977 the defendant had become leader of the Country Liberal Party of the Northern Territory Legislative Assembly and in 1978, on self-government, Chief Minister of the Northern Territory. In May 1982, in that capacity, the defendant and Wilson, the Federal Minister for Aboriginal Affairs in the Fraser Liberal Government, released a ten point package containing proposals with respect to the

granting to Aborigines of certain rights with respect to Uluru and Mount Olga. In June 1982, the Connellan Airport building was opened and a dinner was held. Attending that dinner were the then Prime Minister, Mr Fraser, the defendant as Chief Minister of the Northern Territory and a number of Aboriginal people representing the Mutitjulu community and claimants to Ayers Rock. On that occasion Toyne organised a protest. Gathered together were some Aborigines from the Mutitjulu community and some from Docker River near the Western Australian border. On that occasion a letter was handed to the Prime Minister protesting at the then Federal Government's policy concerning Ayers Rock. The protest received much publicity and was televised nationally. Some time after that there was a meeting of members of the Mutitjulu community attended by the defendant and his advisers (including the witness Lovegrove). Toyne was present. It is unclear whether Johnston was present. An argument or disagreement occurred between Toyne and the defendant which was recorded on a video. Toyne claimed that the defendant spoke disparagingly towards the Aborigines present, though I saw no evidence of that on the video. The defendant and Lovegrove were both led to believe - I think reasonably - that the Aborigines present were ignorant of their already existing title to surrounding land, and this, notwithstanding that they had had legal advice via Toyne and others for more than one year past.

It is evident from this meeting that there was a deep

and mutual distrust between Toyne and the defendant. It did not auger well for the success of future negotiations between the Aborigines and the Northern Territory Government and the Fraser Government over the ten point package.

In March 1983, the Hawke Labor Government was elected and thereafter negotiations commenced for the passing of title and control to the Mutitjulu community with a lease-back to the Director of National Parks and Wildlife. It was proposed that the National Park area would be administered by the Director of National Parks and Wildlife rather than as it had formerly been by the Northern Territory Parks and Wildlife Commission, subsequently the Conservation Commission. In November 1983, the Prime Minister, Mr Hawke, publicly announced that the Commonwealth Government intended to grant Commonwealth title to the Uluru and Katatjuta National Parks to the Mutitjulu community and to provide for continuing involvement of the Australian National Parks and Wildlife Services. Within days of that announcement, the defendant called a Territory general election over the issues concerning Ayers Rock. In December 1983, the defendant was re-elected and thereafter there were many public statements about the respective positions of the Territory and of the Commonwealth concerning Ayers Rock. Toyne had a prominent part to play as to public perceptions over this.

In November 1984, there was another Federal election.

The defendant resigned his position as Chief Minister of the Northern Territory, stood for Federal Parliament and was elected as the Territory representative in the Federal Parliament.

On 13 March 1985, Mr Clyde Holding, Federal Minister for Aboriginal Affairs, publicly announced that the title to Ayers Rock would be handed over. It was that announcement which prompted the defendant to make the publications the subject of the actions.

By his amended defence in each action the defendant denied that the matters complained of in their natural and ordinary meaning or otherwise were capable of bearing or in fact bore the imputations pleaded and further denied that the matters complained of or the imputations were capable of being or were in fact defamatory of the plaintiffs as alleged. These matters were not seriously in contest in the course of the hearing, and in my view, the matters complained of and the imputations are, as a matter of law, capable of being defamatory. I am of the view that as a matter of fact the publications were defamatory of each plaintiff. However to the extent that it is alleged that the words made by the defendant bore the meaning that Toyne "had behaved with gross impropriety as a barrister and solicitor" I do not think in fact they were taken to carry that imputation. As will appear, the public perception of Toyne at the time was as a lobbyist or political adviser,

and on the whole of the evidence I am satisfied the defendant's publications were taken to be referring to his conduct in that capacity, rather than in his professional capacity as a solicitor or barrister.

In neither action has the defendant pleaded justification or common law fair comment.

I turn to the defences of qualified privilege. The onus is on the defendant to prove facts upon which the court as a matter of law may find the defamatory matter was published on an occasion of qualified privilege. The general principle of qualified privilege exists for "the common convenience and welfare of society", or "the general interest of society", *Macintosh v Dun* [1908] AC 390 at 399; *Perera (M.G.) v Peiris* [1949] AC 1 at 20; and it has always been recognised that "the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact": *London Association for Protection of Trade v Greenlands Limited* [1916] 2 AC 15 at 22 per Lord Buckmaster LC. A privileged occasion was said by Lord Atkinson in *Adam v Ward* [1917] AC 309 at 334 to be "an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential." In the same case at 349 Lord Shaw approved the classic statement of Parke B in

Toogood v Spyring (1834) 1 CR M & R 181 at 193 that a defendant is liable for a defamatory publication "unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his affairs, in matters where his interest is concerned ... If fairly warranted by some reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." As Dixon J said in *Mowlds v Fergusson* (1940) 64 CLR 206 at 215, Lord Atkinson alone of their Lordships in *Adam v Ward* emphasised the necessity of reciprocity, and Parke B's famous formulation, so often cited and so often approved, demanded "no community, reciprocity or correspondency either of interest or duty." See, too, the cases cited by Clarke JA in *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 101.

That the law in this area is not narrow and rigid is to be emphasised. As the learned author Spencer Bower, The Law of Actionable Defamation Second Edition (1923) p128 at footnote C says:

> "This branch of the law of defamation is, like the law merchant, in a constant state of flux, or rather development. It is not a rigid and inelastic body of rules, fixed for all time, but, in virtue of the main principle ... to which, in the last resort, all particular cases must be referred, it contains within itself the potency and promise of expansion proportionate to the growth of social requirements and tendencies."

On occasions of qualified privilege, in the absence of malice, a person is entitled to make defamatory statements of another. On such occasions the right of freedom of speech prevails over the right of reputation. As Lord Diplock said in *Horrocks v Lowe* [1975] AC 135 at 149:

> "My Lords, as a general rule English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. ... The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. ... the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit, the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege."

It is to be observed that Lord Diplock did not say reciprocity of interest or duty is essential. I am respectfully of the view and hold, that reciprocity of interest or duty is not a universally necessary ingredient of the defence of qualified privilege. The presence or absence of an interest in the recipients to receive the publication is nevertheless a relevant factor in deciding whether the occasion of publication is privileged.

If, contrary to my opinion, reciprocity of interest is

essential, then, as Hunt J pointed out in *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 40, in a passage expressly approved by Clarke JA in *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 101:

> "... The interest or apparent interest of the recipients need not be a proprietary one, nor even a pecuniary one: *Howell v Lees* (1910) 11 CLR 361 at 369, 396. The word 'interest' is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news. ... *Andreyevich v Kosovich and Publicity Press (1938) Pty Ltd* (1947) 47 SR (NSW) 357 at 363, 366. ... The interest must be definite; it may be direct or indirect, but it must not be vague or insubstantial - so long as the interest is of so tangible a nature that it is expedient to protect it for the common convenience and welfare of society, it will come within the privilege afforded ..."

And see, too, *Austin v Mirror Newspapers Ltd* [1986] A.C. 299 at 312.

I steadily bear in mind that a defamatory publication has no claim to privilege merely because it deals with a matter of public interest, see *Truth (NZ) Ltd v Holloway* [1960] 1 WLR 997 (PC), *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, *Nationwide News Pty Ltd v Wiese* (1990) 4 WAR 263, and that there is no defence of freedom of information on matters of public interest and no principle of law which entitles a newspaper to publish a defamatory statement about an individual under the protection of qualified privilege merely because the statement is made in the course of dealing with a matter of general public interest, see

Nationwide News Pty Ltd v Wiese, supra, at 267.

In each case as the Earl Loreburn said in *London Association for Protection of Trade v Greenlands Limited*, supra at 29:

> "The court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege."
> (Again, it is to be noticed that in formulating the relevant question, no mention is made of reciprocity of interest or duty.)

The question of malice, to which I shall return later, apart, the question is whether the proven facts in this case are such that as a matter of law the defamatory statements of the defendant were published on occasions of qualified privilege. Upon consideration of the circumstances of this case I have come to the conclusion that they were. What are the facts here? At the time the defendant was the sole Northern Territory Federal member of the House of Representatives. He had contested that Territory seat in the Federal House of Representatives in the 1984 election and the question of 'land rights' was a prominent issue in the campaign. He was successful in that election. Formerly he had been the Chief Minister of the Northern Territory and his government's election campaign in 1983 in which his government achieved a 'landslide' victory was based on a campaign in which 'land rights' was also a prominent issue.

The 'land rights' issue, especially as regards Ayers Rock, was a major matter of public concern within the Northern Territory at the relevant time. As Chief Minister of the Northern Territory the defendant strongly held and promulgated the view that the question of ownership and administration of Ayers Rock and the Olgas was a matter for the Northern Territory rather than for the Federal Government and authorities, and that he would as far as possible resist Federal intervention. It was apparent that the defendant's success in the Federal election and the result of the Northern Territory Government's successful 1983 election campaign and 'landslide' victory, strongly indicated that the majority of Northern Territorians supported the Northern Territory's Government's opposition to the hand over of Ayers Rock. The question of the hand over of title to Ayers Rock to the Aboriginal people and the question whether control of Ayers Rock would be in the hands of Federal or Territory Authorities were matters of public interest and debate amongst residents of the Territory and elsewhere in Australia. The role of 'white advisers' to the Aboriginal claimants to Ayers Rock was also a matter of public discussion and debate. The public discussion and debate were sometimes acrimonious. Before the publications complained of, Toyne had participated in radio talkback programs expressing views contrary to those of the defendant on these issues. The question of the hand over of Ayers Rock to Aboriginal interests was a matter of widespread public discussion and debate and controversy throughout

Australia, the nature of which can, to some extent, be gauged by an article published throughout Australia and elsewhere in the Weekend Australian on 25/26 August 1984 under the headline "A 'white Stirrer' sees Australia as a racist society" (exhibit D21). I deem it appropriate to set out that article in full.

> "For many Australians, Philip Toyne is the archetypal 'white stirrer'. His years as a legal adviser to the Central Aboriginal Land Council have been spectacularly successful, culminating last December in the Federal Government's handover of Ayers Rock to the Pitjantjatjara people.
>
> Others might find 'stirrer' a pale word. They might see Mr Toyne, 37, as a ruthless manipulator of the Aboriginal cause; a man who leapt blithely aboard the land-rights bandwagon and who has ridden it skilfully for almost a decade.
>
> Toyne, who is based in Alice Springs and was in Sydney this week to promote Growing Up The Country, a book on the Pitjantjatjara that he has written with Daniel Vachon, doesn't agree.
>
> 'In many, many instances the Pitjantjatjara have shown themselves perfectly capable of making their own decisions about which way they're going to go,' he says.
>
> 'A lot of the advice I've given has been rejected out of hand. A lot of it's been accepted. But there's absolutely no sense in the Pitjantjatjara slavishly accepting anybody's advice about anything.
>
> 'They've got an incredibly powerful sense of identity. But they also realise the only way they can achieve things like land rights or good mining agreements is to bring in specialist advice.
>
> 'They know about their own land. They know about their culture. But they don't know about how you deal with parliaments; how you deal with mining company boards.'
>
> Reared in Melbourne and trained as a lawyer and a teacher, Toyne went to the remote central Australian cattle station, Haasts Bluff, in 1973 as a schoolteacher.
>
> Eleven years in the Northern Territory have convinced

him, not only of white Australians' innate racism, but of their "profound ignorance" of Aborigines.

'Given that we have the same sort of heritage and genes as the British who went to South Africa, I suspect it's circumstantial that our racism isn't more apparent.

'I suspect that if there were 20 million Aborigines in Australia and a very small population of whites we could end up very easily in an apartheid situation.

'Because blacks were eliminated effectively from this area of Australia where most white Australians live, the racial interface - where it really sparks - is in the north of Australia.

'That racial conflict is rife. It is a day-to-day reality. Yet most whites who live in northern Australia weren't born and raised there. Ten per cent of the population, I think, can claim to have been born and raised in the north.

'But right across the board there is an intense racist feeling. That suggests to me that once people from the south-east of Australia are exposed to the racial interface they readily adopt racial attitudes. That really bothers me.'

Growing Up The Country is the story of the forming of the Pitjantjatjara Council and the tribe's achievements."

Toyne said, during cross-examination, he thought this article 'comes out on balance quite fairly'. He rejected 'white stirrer' as an accurate description of himself. Exhibit D21, the Connellan Airport incident and other evidence demonstrate that Toyne was involved in public political conduct. Of course, there is nothing wrong with this, but any political conduct invites - if it does not welcome - criticism, and prior to the publications complained of, Toyne had publicly suffered criticism. There was political hostility towards Toyne. He had many critics within the Northern Territory Government and the Northern Territory Public Service.

During the time leading up to the publication, Toyne had supported the Federal Labor Government's proposals to "hand over" Ayers Rock to Aboriginal interests with a lease-back arrangement of the Park area to Federal authorities for administration by them. The Yulara Tourist Complex had been constructed at the instigation of the Northern Territory Government and the defendant saw the Northern Territory Government's investment as being at risk with the Federal Labor Government's proposals. When Chief Minister of the Northern Territory, the defendant had offered a 'land rights package' to the Aboriginal people and Toyne had been in a position to influence, and had in fact influenced the Aboriginal people to prefer dealing with the Federal Labor Government rather than the Northern Territory Government. Toyne had given legal advice to the Aboriginal community which had political implications and he had advised on those political implications. Toyne had, it is true, acted as a legal adviser in a professional capacity but he had also acted on the national stage publicly and as a political agitator. He was, I think, accurately described by Dr H C Coombs as "a lobbyist" and was regarded by the public as such. Whether justifiably or unjustifiably, Toyne distrusted the Northern Territory Government and the Northern Territory Public Service and was firmly of the view that the best interests of the Aboriginal people he was advising lay with a Federal Labor Government rather than the Northern Territory Country Liberal Party Government.

Prior to the publications complained of, views were polarised within the community about the activities of Mr Toyne. There is a body of evidence in this case which I accept that the reputation of the plaintiffs had already suffered as a result of press reports and comments which were critical of their role as 'white advisers'. Whether or not any of those comments were fair or justified is irrelevant for present purposes, cf *Dingle v Associated Newspapers Ltd* [1964] AC 371. Prior to the publications, the subject of this action, the fact is that white advisers working for Aboriginal groups had been a constant target of attack. When the defendant made the remarks complained of, the plaintiff Toyne conceded that it was just one item in an ongoing series of criticisms that had been levelled against white advisers to Aboriginal communities. Toyne gave evidence that over the issue of the Ayers Rock title hand over he perceived there to have been an 'orchestrated campaign on the part of the Northern Territory Government to make maximum conflict out of the issue', and he gave evidence that white advisers from time to time became the subject 'of quite vitriolic criticism'. Toyne identified the derogatory cartoon exhibit D7 as referring to himself and a small group of other people and gave evidence:

> "... what happened is a process of this unfounded criticism just being repeated over and over and over again, and ... at the end of it, Mr Everingham's extraordinary comments and - and naming me was the straw that broke the camel's back. I was not prepared to be bullied like that."

Toyne identified a further cartoon, exhibit D8, as referring

to himself and there were other publications critical of the role of 'white advisers', see eg exhibits D9, D20, D22, D23.

Mr Donald gave evidence that manipulation was a common allegation that one would suffer as an adviser to Aboriginal people and that he was accustomed to have people speak in a highly derogatory and personally offensive way about working as a white adviser to Aboriginal people in the Northern Territory. Mr Bradshaw gave similar evidence. When asked whether she was aware of the newspaper articles that were critical of the role of white advisers to Aboriginal groups, Toyne's wife said: "Yes, I know that was a line run by a certain sort of section in the Territory."

It is thus apparent that Toyne's actions, rightly or wrongly, were a source of hostility, hostility which was resented by his friends and supported by his detractors; but this is no new feature of political life: *Cameron v Consolidated Press Limited* [1940] SASR 372 at 378.

At the time of the publications complained of, the fact of the matter is Toyne was a public and controversial figure. Following the publications complained of there was an immediate public defence of Toyne and Johnston by the then Federal Labor Minister for Aboriginal Affairs, Mr Clyde Holding. Toyne's public stance was also to be seen in his much publicised actions at Connellan Airport when he sought to be seen and was seen as publicly opposing the then

Federal Coalition Government and Northern Territory Government's then joint proposal with respect to the Aboriginal people and Ayers Rock.

The plaintiffs, as "white advisers", were seen by the defendant to be in a position to influence the Aboriginal interests they represented. Toyne was and was seen by the defendant to be sympathetic to the Federal Labor Government and unsympathetic, indeed anti-pathetic to the Northern Territory Government in its endeavours to negotiate and deal with the Aborigines over Ayers Rock. Each plaintiff was an intermediary between the Mutitjulu community and the outside world and people who wished to deal with the Mutitjulu community had perforce to deal through one or other or both of the plaintiffs. The defendant observed what occurred at the opening of the Connellan Airport and in particular Toyne's interruption of the proceedings at which senior members of the Mutitjulu community were invitees. The defendant was aware that many of the Aboriginal demonstrators on that occasion had been brought in from a remote distance. The defendant had also observed Toyne's conduct at the meeting at Uluru, and, as a consequence, the defendant formed the view that Toyne was acting manipulatively. The defendant had information from within the Northern Territory Public service to the effect that Toyne was "militating against reasonable negotiations with the Aboriginal people."

The defendant concluded from these matters that Toyne was actively steering the Aboriginal people towards dealing with the Federal Labor Government to the exclusion of the Northern Territory Government. The defendant concluded that Toyne was "in effect imposing his views" on the Aboriginal people. This was not the fact, but it was not unreasonable for the defendant to have reached this conclusion from his own observations and other circumstances. The defendant had information which led him to believe that the plaintiffs were actively involved in regulating all issues concerning Ayers Rock and outside interests. As I have said, the plaintiffs were intermediaries and people seeking access to Ayers Rock had to deal with the Aborigines through "white advisers", of whom the plaintiffs were two; in particular Johnston as the Mutitjulu community adviser was on the spot and constantly dealing with various approaches. A singer, Val Doonican, sought permission to sing from the top of Ayers Rock. He sang elsewhere. An unusual proposal concerned an artist, Pro Hart, who sought permission to "bomb" Ayers Rock with paint; he didn't.

The defendant was not challenged in cross-examination as to his conclusions about Toyne or his bases for them.

The defendant's evidence is corroborated by other witnesses. Mr Dalton Morgan gave evidence that a number of people within the Northern Territory Conservation Commission held the view that Toyne was a "manipulator", quite

independently of the publications the subject of this action. The Honourable Mr Justice Coldrey of the Supreme Court of Victoria gave evidence. He had been present at the meeting at Uluru and he accepted that for a person in the defendant's position, Toyne's conduct at that meeting may have created the impression that there was a confrontation between Toyne and Everingham in which the Aboriginal community sat passively by not wishing to take sides or any part in it.

Johnston gave evidence that at the time of the publications which are the subject of this action, a "feeling or perception ... was already existing within the white community at Ayers Rock - amongst the Conservation Commission, amongst other people (whom I) had to deal with at Ayers Rock, a feeling that white advisers were creating trouble amongst the Aboriginal community". He accepted that this matter "came to a head in the dispute over film and photography at the Park because rightly or wrongly (I was) perceived as being the person through whom all communications were being directed."

The defendant thus had information available to him suggesting that the plaintiffs were using their positions as white advisers to the Aboriginal community in a way which was manipulative and he considered himself obliged, given the Australia-wide interest in Ayers Rock, to inform the public about these things.

I think these are all relevant matters when considering whether the occasions of the defendant's publications were privileged. In so saying, I disregard the right to make fair comment on matters of public interest, a defence not pleaded in these actions. Privilege deals with false and defamatory statements of fact, not with defamatory comment on proved or admitted facts. A comment may be published to all the world, whereas, generally speaking, false and defamatory statements of fact may only be published to the public at large where the circumstances clothe the occasion of the publication with privilege. Though in the nature of things such occasions will be rare, it is clear that if the general principle earlier referred to is applicable to the facts, the protection of privilege will attach to a publication or publications to the general public; cf *Smith's Newspapers Limited v Becker* (1932) 47 CLR 279 at 304 per Evatt J; and see too, *The Telegraph Newspaper Company Limited v Bedford* (1934) 50 CLR 632 at 658, and *Nationwide News Pty Ltd v Wiese*, supra, at 269 per Kennedy J, and *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

I remind myself, see *Morosi* at 783, 784, that there is no general principle that defamatory statements published by ministers to the world at large are protected by qualified privilege simply because they are made by ministers and relate to matters falling within the general area of their ministerial duties. Ministerial statements, like any other, are only protected by qualified privilege when the

circumstances of the case justify that protection.

Whether the extent of publication of the defamatory statement is greater than the occasion of the privilege requires and justifies, is a question of law for the court and not a question of fact, *Adam v Ward* [1917] AC 309 at 318, 320, 321, 326, 327, 348 and is distinct from but may nevertheless be relevant to the question of whether there is evidence of malice, see *Horrocks v Lowe* [1975] AC 135 at 151 per Lord Diplock. Having considerable relevance to the present case, it is appropriate to cite Lord Diplock's speech in that case at some length. It is generally accepted as an authoritative exposition of the relevant principles: *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 41 at 46.

Lord Diplock said (at 149F-151H):

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.
>
> The motive with which a person published defamatory

matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them 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,' that is, a positive belief that the conclusions they have reached are true. The law demands no more.

Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames. If this be proved, then

even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.

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. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. 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.

There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true. But where, as in the instant case, conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied.

The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such

> irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. 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."

It was argued that the extent of publication of the defamatory statements was greater than justified by the occasion of the privilege. It was said that recipients of the publications had no legitimate interest in the publications. However, I cannot agree with these submissions. For reasons already given, I, with respect, do not think reciprocity of interest is a necessary ingredient of the defence of qualified privilege in the circumstances of this case. If, however, I am wrong in this, I think a sufficient interest is shown from the circumstances. The

questions of ownership and control of Uluru and Katatjuta were the subject of opposing political campaigns in both Territory and Federal elections, and were matters of great interest and concern to people in the Northern Territory and throughout Australia. So far as the recipients of the defendant's publications were concerned, it was a not insubstantial interest. It was not simply a matter of curiosity but a matter of substance apart from its mere quality as news. The defendant's publications concerning as they did how it came about that Ayers Rock and Mt Olga - which many regard as icons of Australia - once national parks would be owned and controlled by a discreet group of Aborigines whose credentials had been questioned in the course of an unsuccessful land claim in respect of those icons, it seems to me, if published honestly, ought to enjoy the protection of qualified privilege.

I hold that, as a matter of law and in the absence of malice, the defamatory matters were published on occasions of qualified privilege.

I turn to the question whether the defendant, in publishing the defamatory words, was actuated by malice.

The defendant has not apologised for his remarks, but as Lord Diplock said in *Horrocks v Lowe*, supra, (at 152), "A refusal to apologise is at best but tenuous evidence of malice, for it is consistent with a continuing belief in the

truth of what one has said." There is no evidence of the plaintiffs having sought an apology.

As proof of malice, the plaintiffs relied on many things. Counsel for the plaintiffs in opening the case said "... in relation to malice ... there will be a plethora of evidence about prior attitudes expressed by Mr Everingham, that indicate an absolute bias against the Aboriginal community." In his final submission after the close of evidence however, counsel for the plaintiffs conceded that the viva voce evidence "may not support the use of the adjective if it is construed as meaning a bias in each and every way." Counsel also conceded that the use of the adjective was "unnecessary and indeed was not adopted by the plaintiffs or witnesses called on their behalf." However, it was submitted that the plaintiffs had made out a case of bias on the part of the defendant "in relation to land right matters which it is submitted equally gives rise to malice."

I have no doubt that Toyne deeply distrusted the defendant and at all times perceived the defendant to be a person who was racially biased, and, moreover, a person who could not be trusted to deal fairly - as he saw it - with the interests of the Aboriginal community of the Northern Territory. I am equally of no doubt that there is no foundation for those views. The defendant had been a solicitor in Alice Springs for some years and had on many

occasions acted for Aborigines. Amongst other things he had incorporated the now famous Papunya Tula Artists' company which promotes and sells aboriginal art of the Western Desert. The defendant, as Chief Minister for the Northern Territory, had many dealings with Aboriginal people and included Aboriginal people amongst his personal friends. No evidence was called to support counsel's opening. Counsel for the plaintiffs made reference to "a suitcase full of newspaper clippings" which it was said supported the allegation of absolute bias. None of that material which it appears was in the possession of the plaintiffs' solicitors was put to the defendant in cross-examination. Counsel for the plaintiff informed me in the course of the hearing "[The defence has] been given a suitcase full, with respect, of press clippings and statements by Mr Everingham, the effect of which is that, and I can foreshadow that when Mr Everingham gives evidence that there will need to be several, if not a great many matters of that nature put to him."

There was thus a significant attack on the character and credibility of the defendant by the plaintiffs for which the evidence gave no support at all and it is not without significance that that attack was made under the cloak of absolute privilege. It was a calculated attempt by the plaintiffs to make their case more persuasive than it was. As I have said, there is no foundation in fact that the defendant is or ever was biased towards Aborigines and no

whiff of malice can be inferred from or eked out of his attitude towards Aborigines or for that matter his opinions about land rights. The simple fact is, the defendant, who governed and represented both black and white, held strong views about land rights which included Territory as opposed to Federal administration of Uluru and Katatjuta National Parks. He did not ever seek to deny Aboriginal interests at all in those lands. Indeed, at the time the Hawke administration came into power, the defendant was actively discussing a joint proposal with the Fraser government about the granting of land rights to Aborigines. The animosity and distrust felt by Toyne towards the defendant may be gathered, inter alia, from the evidence of Mr McNab. McNab was a legal officer employed by the Commonwealth Crown to prepare the takeover documentation relating to Uluru. He had various dealings with Toyne in relation to those agreements. Mr McNab had prepared an arbitration clause for an arbitrator to be appointed upon the nomination of the President for the time being of the Northern Territory Law Society. Toyne insisted that any nomination of an arbitrator be made by the President of the Law Council of Australia because he considered such a nomination "would be less open perhaps to local interference". McNab said in evidence that there was no possible reason to doubt the independence and impartiality of the President of the Northern Territory Law Society. Toyne insisted on the lease being amended so that any arbitration under the provisions of the lease would not be governed by Northern Territory

law. This he did because he perceived there to be a "general view about the dangers of Northern Territory interference, indirect or direct in the lease."

These matters indicate Toyne's baseless mistrust of the Northern Territory as a whole in dealing with Aboriginal affairs. The submission that the plaintiffs had made out a case of malice "which can be categorised as a bias against Aboriginal people and/or Aboriginal communities, vis-a-vis their claims and aspirations to land rights and in particular in relation to Uluru-Katatjuta", is rejected.

The defendant gave evidence that he considered the plaintiffs, or at least Toyne, to be players in a political game and "in the ring". It was submitted by the plaintiffs that as such he intended by the publications to harm the participants as if they were taking part in a boxing match. It was submitted that this was a clear intent on the part of the defendant to harm the plaintiffs, those they represented and the causes they espoused. It was further contended that malice on the part of the defendant was to be inferred from the breadth of the publications. It was submitted that the defamatory statements were not made for the purpose conferred by the occasion of qualified privilege in that the attack upon the plaintiffs was at best peripheral to the issue of the decision of the Commonwealth Government to agree upon the terms of the transfer of Uluru and Katatjuta to the Mutitjulu community. It was said there was an

ulterior, improper and dishonest motive in making the statements, namely an attack upon the plaintiffs. It was contended that the defamatory statements were so inconsistent with the truth "that the inconsistency of itself gave rise to an inference of malice."

It was submitted that for the defendant as a previously practising solicitor in the Northern Territory, and as a person conscious of the difficulties inherent in advising Aboriginal communities, to say of the plaintiffs that they were unscrupulous and manipulative was so dramatically inconsistent with the truth that the court should infer malice. Counsel pointed to the extravagance and colour of the defendant's statements and the severity of the aspersions cast upon the plaintiffs' characters. He referred to the language used and broad-ranging nature of the attack upon the plaintiffs.

To say that the defendant believed in the truth of what he was saying in the defamatory statements because of his experiences with Toyne at Connellan Airport and in relation to the "ten-point package" at the meeting at Uluru back in 1983, said counsel for the plaintiffs, was incredible. It was also submitted that the inference of malice arose from a reckless indifference of the defendant. It was submitted that given the evidence of the plaintiffs' witnesses (which I accept) that the plaintiffs were people of good character who were scrupulous in their professional dealings with the

Aboriginal community they represented and with others with whom they dealt, it was obvious that had the defendant made enquiries or taken care to verify the truth of his statements prior to their publication, the defendant would have been informed of the true position. Reliance was placed upon the statement of Esher MR in *Royal Aquarium and Summer and Winter Garden Society, Limited v Parkinson* [1892] 1 QB 431 at 444:

> "If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject-matter that he was reckless whether what he stated was true or false, there would be evidence upon which a jury might say that he abused the occasion."

As proof of malice, reliance was also placed upon the conduct of the defendant's case in the course of the hearing. Reference was made to the repetition of the defamatory statements during the course of the trial, to the lack of an apology, to the vehemence of the cross-examination of the plaintiff Toyne and to the vehemence of the language used by the defendant in the defamatory publications. The language used was said to be intemperate, abusive, unnecessary and unwarranted and extravagant. Counsel for the plaintiffs submitted that the defendant was a person of significant standing within the Northern Territory and as a member of the Federal Parliament within Australia his conduct was high-handed, oppressive, insulting and contumelious. All of this was said to be a clear indication of the defendant's malicious intent.

It was never suggested to the defendant in cross-examination that he was motivated by personal animosity or ill-will towards the plaintiffs. The defendant gave evidence that he did not "hold any malice or ill-will towards Mr Toyne or anyone else". The defendant was asked during the examination-in-chief, "What do you say then to the suggestion that you're the subject of an absolute bias against Aboriginal communities?", and he said, "Well, I - I resent that. I - I have no bias against Aboriginal people at all and am friendly with quite a number of them." He was not cross-examined upon that evidence.

Having heard the defendant give evidence, I am satisfied that he believed in the truth of what he published. I think the defendant acted impulsively and illogically and perhaps irrationally in arriving at the belief he did. To some degree he leapt to conclusions on inadequate evidence but nonetheless I find that at the time he believed the truth of what he said, and, as Lord Diplock pointed out in the passage previously cited from *Horrocks v Lowe*, the law demands no more. The dominant motive which actuated the defendant in the present case was not to harm the plaintiffs, but to inform the public as to how the handover came about and to protect what he honestly saw to be the Northern Territory's interest and the general public's interest in Uluru and Katatjuta and their administration and Yulara. No doubt the defendant was indignant for what he believed to be the plaintiffs'

conduct. No doubt, too, he expressed himself in strong language - but I think that language is indicative of indignation and conviction rather than malice and an intent to injure. Nonsense is often published with passion.

Having heard the evidence of the defendant, I believe him, and, moreover in all the circumstances, I can not infer that the defendant did not believe his statements to be true or that though believing them to be true he realised it had nothing to do with the duty or interest on which the qualified privilege was based. Nor can I find or infer that the defendant used an opportunity to raise irrelevant defamatory matter to vent his personal spite on the plaintiffs or for some other improper motive. In all the circumstances I find the defendant was not actuated by malice.

It follows from this that in each action the defence of qualified privilege succeeds and the actions must be dismissed with costs.