IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 184/98

BETWEEN **FERRYMEAD TAVERN LTD**

First Plaintiff

AND **ROBERT NICHOLAS DYMAND**

Second Plaintiff

AND **LEANN MULLOY**

Third Plaintiff

AND **THE CHRISTCHURCH PRESS CO LTD**

Defendant

Hearing 28 July 1999

Judgment. 1st August 1999

Counsel: A C Hughes-Johnson QC and CJR Baird for Plaintiffs
J B Stevenson for Defendant

JUDGMENT OF MASTER VENNING
On Defendant's Application For Summary Judgment

Solicitors.
Dougall Stringer, Christchurch for Plaintiffs
(Counsel – Mr Hughes-Johnson QC, Christchurch)
Atkinson Butterworth, Auckland for Defendant
(Counsel – Mr Stevenson, Wellington)
Cc:
Hansen J

THE CLAIM AND THE PARTIES

[1] On Monday, 27 July 1998 the Defendant published the following item on the front page of "The Press" newspaper:

> "**Police called to church hall party**
> Police dispersed 200 gatecrashers at a St Albans church hall during a night of party mayhem in Christchurch.
>
> Senior Sergeant Ian Freeman said the incident was one of several functions police were called to in Christchurch on Saturday night.
>
> The party in Gosset Street was a private function being held by a young woman. The gatecrashers had arrived virtually all at once, much to the distress of the hostess One person was badly assaulted during the attack and was taken to hospital.
>
> A party at a private house in Englefield Road, Belfast, was broken up after it got out of hand and 80 people sent home by police
>
> A 'free for all' with 'nasty racial overtones' at the Ferrymead Tavern was broken up by police although no arrests were made "

[2] The reference to "a 'free for all' with 'nasty racial' overtones" at the Ferrymead Tavern was incorrect There had been no such incident at the Ferrymead Tavern.

[3] The Plaintiffs sue the newspaper in defamation The First Plaintiff is Ferrymead Tavern Ltd. The Second Plaintiff, Mr Dymand, is the managing director of the First Plaintiff. The Third Plaintiff is the manager of the Ferrymead Tavern. Between them Mr Dymand and Ms Mulloy are responsible for the conduct of the tavern and the restaurant business known as the Ferrymead Tavern

THE APPLICATION

[4] The Defendant has filed a defence relying on, inter alia, statutory qualified privilege. The Defendant considers that statutory qualified privilege is an

absolute defence in this case. The Defendant seeks summary judgment against the Plaintiffs.

BACKGROUND

[5] The Defendant accepts that the reference to the Ferrymead Tavern was a mistake The mistake came about in the following way The Police in Christchurch have a policy to issue material for the information of the public. One means by which this is done is to provide a media tape The tape can be directly accessed by the media. The Police also have a communications room from which information is supplied. On Sunday, 26 July 1998 Sinead Marie O'Hanlon, a reporter employed by "The Press" was rostered as the Police reporter. She made several routine calls to the Police media tape and to the communications room to obtain information of any interesting incidents over the weekend. On that Sunday Snr Sgt Ian Freeman was on duty as the communications senior Ms O'Hanlon spoke to Snr Sgt Freeman. He described several incidents to her, including an incident at the Ferrymead Tavern Ms O'Hanlon's notes of the information given by the Senior Sergeant to her were

> "Nasty racial F T
> Big free for all Ferrymead Tavern
> - Skinhead racial overtones
> - No arrests"

[6] On the basis of that advice the reporter prepared the item which appeared in the newspaper.

[7] After the item appeared in "The Press" Ms O'Hanlon received a call from the Ferrymead Tavern. The caller stated there had been no such incident of the nature reported. The reporter rang the Christchurch Police Media Liaison, Maggie Leask, as Snr Sgt Freeman was off duty The reporter also checked with

the communications room. The on duty Sergeant checked the incident book for the weekend. As a result of those inquiries it became clear to the reporter that another tavern had been involved in the racial incident, although the Police had been called to the Ferrymead Tavern earlier on the Saturday night. The Police acknowledged that it was their mistake to refer to the Ferrymead Tavern in relation to the "free for all with nasty racial overtones".

[8] As a result Ms O'Hanlon discussed the position with the Chief Reporter A correction was written and published on the next day, Tuesday, 28 July The correction stated:

> "**Tavern wrongly named**
> The Ferrymead Tavern was incorrectly named in the Press yesterday as the scene of a weekend brawl The information was wrongly supplied by police."

[9] The Plaintiffs were not satisfied. These proceedings followed.

DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT

[10] Since an amendment to the High Court Rules on 9 November 1998 the Court may now give judgment against a plaintiff if the defendant applies for judgment and satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed If a defendant is only able to show that some but not all of the causes of action cannot succeed it should rely on an application to strike out rather than an application for summary judgment

[11] The commentary to *'McGechan'* on the amended rule at HR136 09A is to the effect that an application for summary judgment by a defendant is similar to a striking out application except the defendant has to show that all of the plaintiff's causes of action cannot succeed. The major difference between an application for summary judgment and a strike out application is, of course, that a

defendant making an application for summary judgment may put evidence before the Court by way of affidavit. If that evidence is disputed or is insufficient to satisfy the Court then the matter will have to proceed to a full hearing The onus is on the defendant to satisfy the Court the plaintiff has no arguable answer to the defence raised.

[12] In this case the defence raised is, if made out, an absolute defence to the Plaintiff's claim for defamation.

STATUTORY QUALIFIED PRIVILEGE

[13] The sections of the Defamation Act 1992 (the Act) relevant to this application are as follows:

"16. QUALIFIED PRIVILEGE--

. .

(2) Subject to sections 17 to 19 of this Act, the publication of a report or other matter specified in Part II of the First Schedule to this Act is protected by qualified privilege

(3) Nothing in this section limits any other rule of law relating to qualified privilege."

"18. RESTRICTIONS ON QUALIFIED PRIVILEGE IN RELATION TO PART II OF FIRST SCHEDULE--

(1) Nothing in section 16 (2) of this Act protects the publication of a report or other matter specified in Part II of the First Schedule to this Act unless, at the time of that publication, the report or matter is a matter of public interest in any place in which that publication occurs

"

"SECOND SCHEDULE
PART II
Publications Subject to Restrictions in Section 18

15 A copy or a fair and accurate report or summary of a statement, notice, or other matter issued for the information of the public by or on behalf of the Government or any department or departmental officer, or any local authority or officer of the authority."

ANALYSIS

[14] Sections 17 and 19 are not applicable to the present case.

[15] To succeed with its defence in this case the Defendant must establish that the item in the newspaper was:

1 A fair and accurate report or summary of a statement, notice, or other matter, issued for the information of the public by or on behalf of the Police and,

2 That at the time of the publication the report or matter was a matter of public interest in any place in which that publication occurred

[16] The issues for determination can be further broken down to·

- Was the statement a statement, notice, or other matter issued by or on behalf of the Police – ie was it of a sufficiently official nature? – the "status requirement".
- Was the statement issued for the information of the public?
- Was the statement on a matter of "public interest"?
- Was the statement a matter of public interest in any place in which the publication occurred, having regard to the wide circulation of "The Press"? – the "locational" requirement.

WAS THE STATEMENT ISSUED BY OR ON BEHALF OF THE POLICE? – THE STATUS REQUIREMENT

[17] The Plaintiffs' challenge under this head was primarily directed at the status of the statement.

[18] There is no challenge to the reporter's evidence that the report was a fair and accurate report of what she was advised by the Police. Her evidence is that:

> "6. Senior Sergeant Freeman said there had been a big free-for-all at Ferrymead Tavern involving a skinhead or skinheads and there had been nasty racial overtones He said the Police had broken it up without making an arrest
>
> 7. A copy of the notes I made at the time are attached hereto marked 'A'. the notes are in the top right hand corner and read·
>
> 'Nasty racial F.T
> Big free for all Ferrymead Tavern
> - Skinhead racial overtones
> - No arrests'
>
> This was reported [in the Press] in one sentence at the bottom of a brief report rounding up all the incidents .. "

[19] While the report is not a verbatim report of the Police advice, the Defendant satisfies the Court that the report that appeared in the paper was a fair and accurate report of the statement obtained from the Police.

[20] Mr Hughes-Johnson submitted that the circumstances in which the statement was obtained meant that it was not of a sufficiently official nature to qualify for privilege

[21] A useful starting point for consideration of this submission is the following statement of Jordan CJ in *Campbell v Associated Newspapers Ltd* [1948] NSWSR 301

> "The notice or report must be of a genuinely official nature, and must be issued in such circumstances that it may fairly be regarded as issued for the information of the public It is not, of course, for this Court to assume to lay down rules for what is, and what is not, proper to be made the subject of a governmental or police notice or report I see no reason for doubting that an authoritative announcement of an official character made or handed to members of the press for publication in their respective newspapers would, or at least could, constitute a notice or report issued for the information of the public, and if published in the form in which it was supplied would be published

> with the consent of the department, etc., supplying it. On the other hand, if the matter so supplied was such as to admit of a reasonable inference that it was mere gossip and not an official notice or report, or that an official report so supplied was not published in substantially the form in which it was issued, it would be competent to the tribunal of fact to find that the defence had not been made out." p303

[22] The fact the statement was obtained in response to an inquiry from the reporter does not of itself mean the statement was not issued by the Police *Blackshaw v Lord* [1984] QB 1 (CA)

[23] In *Blackshaw*'s case the chairman of a House of Commons committee gave a press conference concerning the committee's investigations of mis-management in a government department. A reporter rang the press officer in the department to make inquiries. After insistent questioning the officer said that the plaintiff had resigned from the department following the investigation The reporter concluded, and published, that the plaintiff had been dismissed for mis-management. It was held that even if the report had been an accurate representation of what the press officer had said it was still not protected by statutory privilege. After referring to the above passage of Jordan CJ in *Campbell*'s case Stephenson LJ stated.

> "It may be right to include in the paragraph's ambit the kind of answers to telephoned interrogatories which Mr Lord, quite properly in the discharge of his duty to his newspaper, administered to Mr Smith. To exclude them in every case might unduly restrict the freedom of the press and I did not understand Mr Eady to submit the contrary But information which is put out on the initiative of a government department falls more easily within the paragraph than information pulled out of the mouth of an unwilling officer of the department, . ." p24

[24] In my view the following factors support a finding that the statement was issued by the Police.

[25] Although the information in the statement was supplied in answer to an inquiry from the reporter, it was supplied willingly by the Police Further, it was

supplied from the communications room run by the Police. It may be inferred the Police communications room exists to provide information held by the Police to the public. The information is no doubt edited and controlled by the Police One means of disseminating the information to the public is via the media.

[26] Ms O'Hanlon rang the Police communications room specifically to obtain information about incidents the Police were involved in over the weekend The information was imparted by a person in authority, Snr Sgt Freeman The Senior Sergeant was on duty at the time as the communications senior in the communications room. There is no suggestion that he was not authorised to pass on the information he did to the reporter. In those circumstances, in my view the evidence establishes that the information came from a formal source within the Police. The circumstances in which the reporter obtained the information does not defeat the claim to statutory privilege

[27] The next aspect of this status argument is whether it can be said the statement was in the nature of an official release as distinguished from mere interesting gossip. In his book *'News Media Law in New Zealand'* (3rd ed) Professor Burrows states

> "There is no requirement that the initial statement be issued in writing as a press release; an oral statement would seem to be covered as well. But it appears that the statement must legitimately be able to be described as an 'official release'. Such releases must be distinguished from 'mere interesting gossip supplied to journalists by the publicity officer of a minister for the purpose of keeping his minister and department prominently in the public eye.'" p79

That author takes that statement from the case of *ex p Kempley* (18/1/44),which although unreported is referred to in *Forster v Watson* (1944) 44 NSWSR 399 In *Forster v Watson* Jordan CJ appeared to accept the above, obiter view expressed in *ex p Kempley*

[28] In support of his submission on this point Mr Hughes-Johnson referred to the following passage from Perera v Peiris [1949] AC 1 (PC). In that case it was stated:

> "As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach." p21

The reference to "other bodies" was to distinguish between the reports of judicial and parliamentary bodies on the one hand and reports of "other bodies" on the other for the purposes of privilege at common law

[29] Mr Hughes-Johnson submitted that in the present case the statement was more in the nature of mere interesting gossip. He noted it was in direct response to the request from the journalist whether there were any "interesting incidents over the weekend".

[30] However, the statement was more than gossip. It was a summary of police action taken in relation to an incident in a public place. It was not in the nature of mere interesting gossip to promote the profile of the Police The statement not only came from a Police source, but more particularly from the Police communications room. It is not as though it was obtained from an off-duty constable known to the reporter. It was a release of information by the Police about policing matters. The statement is of a sufficiently official nature to satisfy the requirement

WAS THE STATEMENT ISSUED FOR THE INFORMATION OF THE PUBLIC?

[31] Mr Hughes-Johnson next referred to the requirement for the statement to be issued for the information of the public He accepted that this

submission was largely related to the status issue. However, he addressed it as a separate ground and submitted that the statement was not legitimately for the information of the public.

[32] I am unable to accept that submission. Whilst the source of the information is not determinative, the fact the Police maintained a media tape and a communications room for the purpose of issuing information to the public is a significant factor.

[33] The information in the statement was information relating to policing matters in Christchurch.

[34] The fact the incident may have been a relatively minor incident, and that is not necessarily accepted by the Defendant, does not disqualify the statement from having been issued for the information of the public *Boston v W S Bagshaw & Sons* [1966] 2 All ER 906.

[35] I find that the statement in this case was issued for the information of the public.

PUBLIC INTEREST

[36] Mr Hughes-Johnson next submitted that the statement could not properly be said to be of public interest at the time of the publication.

[37] He submitted it was pivotal for the Plaintiffs that the term "public interest" used in s18 of the Act imposed a restriction on the publication of material and that in this case the statement was not of public interest

[38] At common law a cautionary approach has been taken to the defence of privilege on the basis that the information was of public interest In *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 the Court of Appeal noted that a

newspaper had two main functions. First, to publish reports of various types of proceedings, and second, to provide its readers with news and even gossip concerning current events and people While privilege might be accorded to the first function, the Court said.

> "In this second field ... there is no principle of law . which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest." p83

[39] In the course of the decision North J stated.

> "In what we have described as the second field, we think the decision in _Perera_'s case cannot be relied upon as affording privilege to a newspaper merely because the defamatory statement is made in the course of dealing with a topic of general public interest It has been well established that, in these circumstances, no special privilege attaches to newspaper publications, and it cannot be thought that it was in any way intended in _Perera_'s case to set aside this rule by implication only." p83-84

[40] The Court effectively made a distinction between a matter of public interest and a matter in which the public is simply interested

[41] In a later Australian case, _Australian Consolidated Press v Uren_ (1965-66) 117 CLR 185 the High Court of Australia stated:

> "The critical question for his Honour on my view of the matter was thus, in respect of each count, whether the publication was 'in the course of the discussion of a matter of public interest' . The question for his Honour thus required some limitation of the subject of public interest that was under public discussion. When protection is claimed for a defamatory publication on the ground that it was made in the course of discussion of a subject under public discussion relevant to it, that subject must necessarily be determined with some exactness. .. A matter is I think published in the course of the discussion of some subject of public interest when, as the learned trial judge in the present case said, a discussion of that subject is currently going on." p209

[42] In _London Artists v Littler_ [1969] 2 QB 375 Lord Denning MR discussed the concept of "public interest" in this way:

> "There is no definition in the books as to what is a matter of public interest ... I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment." p391

[43] Lord Denning's approach to "public interest" was adopted by Brennan CJ and Gaudron J in the High Court of Australia in the recent case of _Bellino v Australia Broadcasting Corp_ 135 ALR 368 at pp375,412. However, the majority (Dawson, McHugh and Gummow JJ) took a more restrictive view of public interest The majority considered at least for the purposes of the statutory defence under the Queensland Criminal Code, public interest should be limited to

> "... the conduct of a person engaged in activities that either inherently, expressly or inferentially invited public criticism or discussion." p396

The majority considered that the privilege could apply to statements concerning:

> "... any person holding public office, participating in the administration of justice or public affairs, offering goods or services to the public or otherwise engaging in public conduct that invites public criticism or discussion ..." p397

[44] In summary, Mr Hughes-Johnson submitted that the common law favoured restrictions on the concept of public interest; and that the statutory provisions in New Zealand are different to the perhaps broader test of "an interest" under the Australian Defamation Act 1974 as considered by the Privy Council in _Austin v Mirror Newspapers Ltd_ [1986] 1 AC 299. I accept that it is proper to treat the authorities that deal with different statutory provisions with caution, but nevertheless assistance can be gained from a consideration of those authorities which have discussed the concept of "public interest" such as _Bellino_'s case.

[45] It should also be noted that the Court of Appeal's approach to even the common law defence of privilege may be changing. In _Pauanui Publishing &_

Anor v Montgomerie (21/10/97, CA 65/97) Henry J, delivering the decision of the full Court, said (obiter):

> "Although it is unnecessary for the purposes of the present appeal, we would be inclined to the view that publication in this specialist type weekly newspaper of matters of particular interest to the business community, such as the financial activities of persons in or recently in business who have been declared bankrupt, could come within the exception. On occasions inconvenience of a specific section of the public resulting from the restriction of free writing, directed to that audience and not generally, can outweigh the infliction of private injury Although the right to publish defamatory material is not to be unduly enlarged under the guise of public interest, neither is it to be unduly hobbled "

[46] It should also be noted that there has been a deliberate move away from the requirement of public concern and public benefit to the simpler "public interest" test in the Defamation Act 1992

[47] In the chapter on defamation in the *'Law of Torts in New Zealand'* (2nd ed) Professor Burrows in his commentary on this requirement states

> " the privilege does not apply unless at the time of publication the reported matter is a matter of public interest in any place in which the publication occurs. The wording of this condition has been changed a little by the Defamation Act 1992 Before this the condition was that the matter reported must be of public concern, and the publication of it for the public benefit. The reduction to one test, public interest is simpler; the expression is a familiar one in other parts of the law of defamation "

[48] If the broad test of public interest favoured by Lord Denning in *London Artists v Littler* and the minority in *Bellino*'s case is adopted, then the test is satisfied The incident in question was one that members of the public might legitimately be concerned about or interested in. However, even if the more narrow approach favoured by the majority in *Bellino*'s case is adopted, the statement in this case satisfies the requirement of public interest If correct it was a report of criminal conduct at a public, licensed premises involving racism At the

least it can be regarded as a report concerning a public entity or persons supplying services to the public

[49] Mr Hughes-Johnson next submitted that the statement in the present case was not of sufficient public interest in any event The extent of the interest required was considered by the English Court of Appeal in _Boston v W S Bagshaw & Sons_ (supra).

[50] In that case a rogue giving his name as "Boston of Rugeley" had pigs knocked down to him at auction. He took the pigs without paying. The auctioneers publicised the incident and noted that the rogue gave his name as "Boston of Rugeley". There were several persons of this name living at Rugeley. The Plaintiff was a well known farmer at Rugeley. The auctioneers also reported the matter to the Police and offered a reward of £25. The Police broadcast a notice mentioning the name "Boston of Rugeley" The Court of Appeal considered the statutory defence of qualified privilege.

[51] In _Boston_ counsel for the plaintiff had argued that the defence did not apply because the matter in issue was not of public concern and publication was not for the public benefit as it was such a small incident. Lord Denning rejected the argument and stated:

> "It seems to me that, in regard to most crimes, if not all crimes, and certainly such a crime as this, it is perfectly proper for the police to take steps by means of newspaper announcements or broadcasts to give information to the public so as to try and find the criminal: and, as such, publication is privileged by reason of the Act of Parliament." p910

[52] The publication in the present case was not directed at apprehension of the criminal, rather it was directed at publication of the incident itself. That does not make any difference. The wording of the statutory defence does not require the publication to be directed at apprehension. The Police

obviously consider it of sufficient importance to maintain a communications room and media tape. There is public interest in incidents which may have racial overtones in public places, particularly at taverns and hotels where alcohol is sold. A community has public interest in such matters There is a sufficient public interest in the statement's subject matter

THE LOCATIONAL REQUIREMENT

[53] Mr Hughes-Johnson next submitted the requirement in s18(1) that the publication must be a matter of public interest in "any place in which that publication occurs" was a locational requirement which mirrored the requirement at common law that to attract qualified privilege the publication must be no wider than was commensurate with the legitimate public interest.

[54] He submitted that even if it could be said that persons in Christchurch might have a legitimate interest in the statement, it could not be said that persons on the West Coast or Nelson (being within the circulation area of "The Press") could have such a legitimate interest. On that basis he submitted the statutory defence could not succeed because of the extent of the publication in this case

[55] The basis of the submission is the requirement of reciprocity in the common law defence of qualified privilege The classic statement of that reciprocity at common law is that of Lord Atkinson in *Adam v Ward* [1917] AC 309

> "A privileged occasion is 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 made has a corresponding interest or duty to receive it." p334

[56] To attract privilege at common law the publication must be restricted or made only to those persons who have an interest or duty to receive it. Publication to others defeats the privilege.

[57] In _Cutler v McPhail_ [1962] 2 QB 292 a ratepayer in the suburb of Pinner suspected a member of the local council of corruption and published a letter in a magazine called "The Villager" in which the suspicions were voiced. "The Villager" was sold in book stores not just in Pinner but also in the neighbouring area of Harrow, it was publicly available at those stores. The Court held that while a similar letter which the ratepayer had written to another councillor was privileged, this one was not as the publication was far too wide. The common law defence of qualified privilege was defeated. See also: _Standen v South Essex Recorders Ltd_ (1934) 50 TLR 365.

[58] The effect of Mr Hughes-Johnson's submission is to read "any place" in s18(1) as "all places" If the submission is correct it would also severely restrict the statutory defence of qualified privilege.

[59] In my view it is not necessary to read the section in the way he suggests. In the *'New Shorter Oxford Dictionery'* "any" is defined as·

> "some -, no matter which, or what . "

[60] In _Lange v Atkinson_ [1998] 3 NZLR 424 the Court of Appeal noted the development of the protection afforded by statutory qualified privilege The Court stated·

> " Parliament is facilitating, promoting or requiring the flow of information and opinion which is seen as having public value to the relevant audience (see s 18(1)) notwithstanding that it may be defamatory and very damaging to someone's reputation. Parliament has made a broad public interest judgment to that effect. ...
>
> ... What the legislation is essentially doing is to make it clear that certain particular reports and matters are protected by that law, subject

in the case of those in Part II (First Schedule) of the list to the public interest limit and the explanation or contradiction processes provided for in s18

In a broad sense Parliament has indicated that generally-published fair and accurate reports of certain matters of public concern if done in good faith will be protected by qualified privilege." p446-447

[61] With the extensive geographical distribution of newspapers in the New Zealand context, and where main suburban newspapers service a number of rural areas as well, a restriction such as argued for by Mr Hughes-Johnson would largely negate the statutory defence of qualified privilege.

[62] It is also to be noted that in the chapter on defamation in the '*Law of Torts in New Zealand*' (2nd ed) Professor Burrows in his commentary on this provision states:

"Under the new Act, the report or publication also must be of public interest at the time of publication, so that the resuscitation of matter at a later date when it has lost its topicality may cease to qualify *However, it is enough that the matter be one of public interest in any place in which publication occurs, this could suggest that matter published in a national newspaper or on national television will be privileged if it is of public interest in any part of the country* It should be noted that, as is the case with reports of Parliamentary and Court proceedings, reports are normally not privileged under this head unless they are fair and accurate." p930 (emphasis added)

[63] The commentator is clearly of the view that "any" is to be read as "any" rather than "all". With respect, it seems to me that must be the correct analysis and accords with the comments of the Court of Appeal in relation to the development of the statutory defence of qualified privilege.

[64] For those reasons I find that the "locational" requirements of s18(1) are satisfied if the report or matter is a matter of public interest in any (meaning some) place or places where the report is published.

APPROPRIATENESS OF SUMMARY JUDGMENT

[65] Finally, Mr Hughes-Johnson submitted that there was insufficient evidence before the Court for the matter to be properly determined on this application for summary judgment. He submitted that further evidence was required as to Police policy, the content of the Police tape, and whether there were internal controls or understandings between the media and the Police as to the use or status of information.

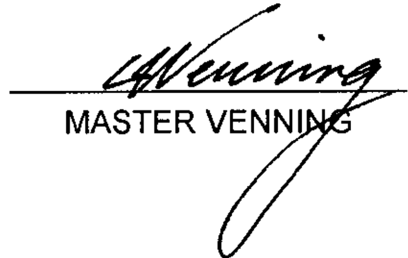
[66] However, while accepting that the onus is on the Defendant to satisfy the Court that the Plaintiffs have no answer to the defence, it is not sufficient for the Plaintiffs to raise general issues as possible answers without some foundation, just as it is not enough for a defendant facing an application for summary judgment to suggest that the action will be defended on the basis of facts which are not deposed to or other hypothetical defences: *Svensens Icecream Co (NZ) Ltd v Milner* (13/12/89, CA 273/89).

[67] While the onus is on the Defendant in the present case, as noted by Wylie J in *S H Lock (NZ) Ltd v Oremland* (19/8/86, HC Auckland, CP 641/86), the discharge of the onus is not to be frustrated by the opposing party raising hypothetical difficulties unsupported by any positive assertion or corroborative documentation.

[68] In the present case the Defendant's evidence is unchallenged There are no gaps to be filled It is not necessary for the Defendant to lead evidence from the Police in support of its application If the Plaintiffs wanted to challenge the Defendant's evidence they could have lead evidence They have chosen not to.

[69] The Defendant satisfies the Court that it is entitled to rely upon statutory qualified privilege in this case. It follows that the Defendant is entitled to summary judgment against the Plaintiffs.

[70] Costs are reserved to be dealt with by way of memoranda.



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